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IN THE

Supreme Court of The United States

JAIME CASTILLO, BRAD EUGENE BRANCH, RENOS LENNY AVRAAM, GRAEME LEONARD CRADDOCK, KEVIN A. WHITECLIFF,

Petitioners

v.

UNITED STATES OF AMERICA,

Respondent

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Jaime Castillo

**Counsel of Record*
[Additional counsel listed on inside cover.]

3818

John F. Carroll
111 West Olmos
San Antonio, Texas 78212
(210) 829-7183
Counsel for Petitioner Renos Avraam

Richard G. Ferguson
P.O. Drawer 7695
Waco, Texas 76714
(254) 772-5525
Counsel for Petitioner Brad Eugene Branch

Stanley Rentz
506 Franklin Avenue
Waco, Texas 76701-2111
(254) 755-7023
Counsel for Petitioner Graeme Leonard Craddock

Steven R. Rosen
440 Louisiana, Suite 2100
Houston, Texas 77002
(713) 227-2900
Counsel for Petitioner Kevin A. Whitecliff

QUESTIONS PRESENTED

18 U.S.C. §924(c)(1) punishes with five years imprisonment whoever, during a federal crime of violence, "uses or carries a firearm, . . . and if the firearm is a machinegun, or a destructive device," with thirty years. The issues are (1) whether the firearm type is an element of the offense which must be alleged in the indictment and found by the jury beyond a reasonable doubt, or is a sentencing factor to be found by the judge by a preponderance of evidence, and (2) whether equivocal "legislative history" overrides the doctrine of constitutional doubt set forth in *Jones v. United States,* 526 U.S. 227 (1999), that a statute must be interpreted to avoid possible unconstitutionality under the Fifth and Sixth Amendments.

PARTIES TO PROCEEDING

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The opinion in *United States v. Branch*, 91 F.3d 699 (5th Cir. 1996) is printed in the Appendix ("App.") at 1a. The order denying the petitions for rehearing, 91 F.3d 752, is at App. 117a. The notice of denial of the petitions for a writ of certiorari, *Castillo v. United States*, 520 U.S. 1185-86 (1997), is at App. 142a. The opinion in *United States v. Castillo*, 179 F.3d 321 (5th Cir. 1999), is at App. 144a. The unreported order denying the petitions for rehearing is at App. 153a. The unreported 1994 sentencing findings and opinion of the district court is at App. 119a. The unreported 1997 order of the district court resentencing defendants is at App. 165a.

JURISDICTION

On August 2, 1996, the Court of Appeals affirmed the convictions under Title 18 U.S.C. on Counts 2 and 3, vacated the sentence on Count 3, and remanded Count 3 for resentencing. The defendants were resentenced on Count 3 and timely appealed. The Court of Appeals affirmed the sentences on June 22, 1999, and denied the petitions for rehearing and rehearing en banc on July 28, 1999. This Court has jurisdiction under 28 U.S.C. § 1254(l).

CONSTITUTIONAL PROVISIONS AND STATUTES

Provisions of the following are in the Appendix, 170a: U.S. Const., Amendments V and VI; 18 U.S.C. § 924(c)(1), (3).

STATEMENT OF THE CASE

(i) Proceedings in the Courts Below

The indictment was filed on August 6, 1993. The jury acquitted all defendants of conspiracy to murder federal agents under 18 U.S.C. § 1117. Defendants were acquitted of aiding and abetting the murder of federal agents (18 U.S.C. §§ 1111(a), 1114, 2), but (except for Craddock) were convicted of the lesser included charge of aiding and abetting manslaughter (Count 2). Defendants were convicted under 18 U.S.C. § 924(c) of using a "firearm" in a conspiracy to commit a federal crime of violence (Count 3). On Count 3, the jury was instructed that guilt was subject to a finding that "the Defendant under consideration" used a firearm. (23 R. 1232, in RE tab 10)

In its sentencing opinion, the district court held that co-conspirators had possessed machineguns and destructive devices, and that this could be attributed to the defendants by sentencing findings. App. 125-26a. It sentenced defendants to consecutive terms of ten years imprisonment on Count 2 and to thirty years imprisonment on Count 3 (except that, in a downward departure, Craddock was sentenced to ten years on Count 3).[1]

United States v. Branch, 91 F.3d 699, 740-41 (5th Cir. 1996) affirmed both convictions but vacated the sentences under § 924(c) and remanded for resentencing. The court explained that *Bailey v. United States*, 516 U.S. 137, 146-50 (1995) held that "use" means "active employment," but the district court had found only "actual or constructive

[1] Craddock was also convicted of possession of an unregistered firearm, 26 U.S.C. § 5861(d), for which he received ten years imprisonment.

possession." (App. 86a) The court held that thirty years could be reimposed if the sentencing court found that "members of the conspiracy actively employed machineguns." (App. 86a)

The dissenting opinion of Judge Schwarzer would have reversed both convictions due to, inter alia, insufficient evidence of individual guilt (App. 98a), and lack of proof that defendants conspired to murder federal agents, an element of the § 924(c) offense.[2] (App. 114a)

The United States opposed the petitions for a writ of certiorari as premature because the sentences were vacated and "it thus remains to be seen whether petitioners will be sentenced" for machineguns. After resentencing, "they will have a further opportunity to contest their sentences in the court of appeals and, if necessary, in this Court." Brief for the U.S. in Opposition, *Castillo v. United States*, No. 96-989, at 22. This Court denied certiorari. App. 142a.

The district court resentenced defendants to thirty years imprisonment on Count 3 (except that Craddock was resentenced to ten years). (App. 169a) On June 22, 1999, the court of appeals affirmed in *United States v. Castillo*, 179 F.3d 321 (App. 144a), and on July 28, 1999, the petitions for rehearing and rehearing en banc were denied. (App. 153a)

Statement of Facts

Mount Carmel, near Waco, Texas, was for 65 years the

[2] "There is no evidence that any of them [defendants] entered into an agreement to kill federal officers, much less that any did so with premeditation and malice aforethought. . . . Their conviction of the predicate offense rests on nothing more than guilt by association." 91 F.3d at 751-52 (App. 116a).

home of the Branch Davidians, a religious sect originating in Seventh Day Adventism. Vernon Howell, known as David Koresh, was the group's leader. The Bureau of Alcohol, Tobacco and Firearms ("BATF") came to suspect that Koresh violated Chapter 53 of the Internal Revenue Code, which requires registration and taxation of certain firearms. BATF agents refused Koresh's invitation to discuss his firearm purchases (Trial Transcript ["TR"] 4861, 4904) and obtained a search warrant.

Some 115 men, women, and children resided at Mount Carmel. On February 28, 1993, 75 BATF agents armed with pistols, shotguns, and submachineguns, supported by helicopters and snipers, stormed the premises. (TR 1445-49, 3826-29) BATF made no attempt to serve the warrant peaceably or to arrest Koresh off the premises. (TR 1330, 6714, 6718)

Who fired the first shot was disputed. According to Castillo, when the agents arrived, Howell opened the front door and stated, "Wait a minute, there's women and children in here." "All of a sudden, shots were fired at the front door," wounding Howell. (TR at 3053, 3094.) BATF agent Ballesteros told investigators that he thought the first shots were fired by other agents shooting the dogs, but at trial he testified (as did other agents) that persons inside the building fired first. (TR 1315, 1372) A firefight ensued.

A prosecution witness who resided at Mount Carmel testified that she did not hear anyone yell "police" before the first shots were fired, and that no insignia could be seen on the armed men outside, who were dressed in black or dark blue. (TR 4584, 4600) Bullets came from the outside through the walls into the house. (TR 4603) Several residents and four BATF agents were tragically killed during the raid.

The FBI's final assault on April 19, 1993, resulted in an inferno consuming the entire building complex, leaving 75 babies, children, men, and women dead. The nine persons who escaped death were arrested.

The jury found that each defendants carried or used a "firearm." "On remand, the district court found that one or more persons involved in the conspiracy to murder federal agents had actively employed machine guns and other enhancing weapons in the firefight on February 28, 1993, and then applied the *Pinkerton* [*v. United States*, 328 U.S. 640 (1946)] doctrine to attribute the active employment of machine guns and other enhancing weapons to the defendants on February 28, 1993." *Castillo*, 179 F.3d at 325 (App. 148a) Alternatively, the district court found that Branch[3] and Avraam[4] used a machinegun on February 28, and that Castillo and Craddock carried a hand grenade on April 19, *id.*, although the jury convicted them of using firearms on February 28.[5] The district court made no finding that the items were carried "in relation to" the predicate

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[3] The court found that "Branch was wearing civilian clothes," an agent saw a man "dressed in civilian clothes, firing what appeared to be a fully automatic weapon," and thus Branch was the man. App. 167a. Yet at least 69 adults were in the building, and there was no eyewitness identification of Branch.

[4] The court found that a cell-mate "testified that Avraam told him that he had a fully automatic weapon during the gun battle." App. 167a. The actual testimony was that Avraam said that before that date "they were issued guns" and that he had an automatic weapon. (TR 6088-6089)

[5] There was evidence that Castillo carried (but no evidence that he fired) a rifle and a pistol on February 28. (TR 3053) The court states that Castillo had a grenade "on his person" on April 19 (App. 168a), but the grenade was found in a pile of gear which could have belonged to any one of five persons whom an agent saw escaping the fire. (TR 5469)

offense. *See* App. 168a. The district court found that "there is no direct evidence that Whitecliff personally used or carried an enhancing weapon." *Id.*

SUMMARY OF ARGUMENT

18 U.S.C. § 924(c) imposes a 5-year sentence for use of a "firearm" in a federal crime of violence, and 30 years for use of a "machinegun" or other enhanced firearm. Defendants were indicted for and found guilty of carrying or using a firearm, not a machinegun. The Court of Appeals erred in holding that the district court may find by a preponderance of evidence that co-conspirators used machineguns and may sentence defendants to 30 years imprisonment.

The statutory text treats a "firearm" and a "machinegun" as elements of the offense *in pari materia*. A conviction for a § 924(c) offense must be based on the charges in an indictment and the verdict of a jury, not on a trial court's sentencing findings.

The Fifth Circuit has decided an important federal question in a way that conflicts with *Jones v. United States*, 526 U.S. 227 (1999), which involved a statute structurally identical to § 924(c). *Jones* held that, under the rule of constitutional doubt, a statute must be interpreted to avoid constitutional problems in regard to the right to notice under the indictment and due process clauses of the Fifth Amendment and the right to jury trial under the Sixth Amendment. Since the provision could be read as either an element or a sentencing factor, it should be interpreted as an element and thus to require that the indictment allege and the jury find the facts necessary for the enhanced sentence.

Castillo brushes *Jones* aside and holds that "legislative

history" distinguishes § 924(c) from the statute in *Jones*. This Court should clarify that "legislative history" does not override the doctrine of constitutional doubt set forth in *Jones*. The Fifth and Sixth Amendments are part of the Constitution, while "legislative history" is not voted on by the Congress, and is often (as here) vague.

The Fifth Circuit is in conflict with the First, Fourth, Sixth, and Ninth Circuits, which have held that, to impose 30 years, the jury must find use of a machinegun. The practice in most circuits is to allege the type of firearm in the indictment and submit the issue to the jury.

The Fifth Circuit's position has the side effect of radically departing from two of this Court's precedents. First, *Bailey v. United States*, 516 U.S. 137 (1995) held that it is a jury function to determine whether a firearm is "used," i.e., actively employed. Implicit in finding "use" is finding what was used. An item a judge finds at sentencing is a machinegun might not have been the "firearm" the jury found to be "used."

Second, under *Pinkerton v. United States*, 328 U.S. 640 (1946), the use of a firearm by a co-conspirator may be attributed to a defendant only under appropriate jury instructions. The Fifth Circuit pushes the envelope by allowing the sentencing court to make this finding.

The Eleventh Circuit and a panel of the First Circuit have agreed with the Fifth, although in regard to firearms which give rise only to ten year sentences. Given the large number of § 924(c) prosecutions and the extreme discrepancy in sentences in the different circuits, this Court should resolve the conflict.

ARGUMENT

I. THE FIFTH CIRCUIT DEPARTED FROM THE RULE OF CONSTITUTIONAL DOUBT PROTECTING FIFTH AND SIXTH AMENDMENT RIGHTS SET FORTH IN *JONES V. UNITED STATES*, 526 U.S. 227 (1999), WHICH MANDATES THE INTERPRETATION THAT THE TYPE OF FIREARM IS AN ELEMENT OF THE OFFENSE

The writ should be granted because the Fifth Circuit decisions conflict with the interpretative rules regarding Fifth and Sixth Amendment rights set forth in *Jones v. United States*, 526 U.S. 227, 119 S.Ct. 1215, 143 L.Ed.2d 311 (1999). *Jones* held that, where a statutory provision could be read as an element of the offense or as a sentencing factor, the doctrine of constitutional doubt requires the former reading in order to avoid a possible violation of the rights to notice, due process, and jury trial. The Fifth Circuit held that "legislative history" overrides the jurisprudential tools set forth in *Jones*. This Court should clarify that it does not.

18 U.S.C. §924(c)(1) punishes with five years imprisonment whoever, during a federal crime of violence, "uses or carries a firearm, . . . and if the firearm is a machinegun," imposes thirty years. The defendants were indicted for and found guilty of use of a "firearm." To convict one of "firearm" use, the indictment must make that allegation and the jury must make that finding. It is textually inconsistent to treat the finding of a "machinegun" as not also being an element of the offense.

The Fifth Circuit held that a machinegun or other enhanced firearm is not an element of the offense and thus need not be alleged in the indictment or found by the jury. *Branch*,

91 F.3d at 738-41 (App. 78-86a); *Castillo*, 179 F.3d at 326-28 (App. 151-55a). Defendants stand sentenced to thirty years based primarily on the district court's sentencing findings that someone in the conspiracy used a machinegun and that defendants are vicariously responsible. App. 122a, 127a (sentencing); App. 166-67a (resentencing).

Jones mandates the interpretation that the types of weapons, including "firearm" and "machinegun," are elements of the offense which must be charged in the indictment and found by the jury. *Jones* concerns the federal carjacking statute, 18 U.S.C. § 2119, which intermixes sentencing and elements provisions. *Jones*, 119 S.Ct. at 1218. The following shows that it is structurally identical to § 924(c):

18 U.S.C. § 2119	18 U.S.C. §924(c)(1)
Whoever, possessing a firearm as defined in section 921 of this title, takes a motor vehicle . . . from the person or presence of another by force and violence or by intimidation, or attempts to do so, *shall* (1) be fined under this title or imprisoned not more than 15 years, or both, (2) *if* serious bodily injury . . . results, be fined under this title or imprisoned not more than 25 years, or both, and (3) *if* death results, be fined under this title or imprisoned for any number of years up to life, or both.	Whoever, during and in relation to any crime of violence or drug trafficking crime . . . for which he may be prosecuted in a court of the United States, uses or carries a firearm, *shall* . . . [1] be sentenced to imprisonment for five years, and [2] *if* the firearm is a short-barreled rife, short-barreled shotgun to imprisonment for ten years, and [3] *if* the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

(Italics and bracketed numbers added.)

In short: whoever commits act A shall be sentenced to X, and if he also commits act B, shall be sentenced to Y. "A" and "B" are fact elements that must be alleged in the indictment and proven to the jury.

While not alleged in the indictment or jury instructions, serious bodily injury was found by the district court by a preponderance of the evidence, and the defendant was sentenced to 25 years. 119 S.Ct. at 1218. *Jones* notes that "§ 2119 at first glance has a look to it suggesting that the numbered subsections are only sentencing provisions." However, that was a "superficial impression [which] loses clarity when one looks at" the penalty provisions. *Id.* at 1219. *Jones* explains:

> These not only provide for steeply higher penalties, but condition them on further facts (injury, death) that seem quite as important as the elements in the principal paragraph (e.g., force and violence, intimidation). It is at best questionable whether the specification of facts sufficient to increase a penalty range by two-thirds, let alone from 15 years to life, was meant to carry none of the process safeguards that elements of an offense bring with them for a defendant's benefit.

Id. With § 924(c), the penalty range increases *sixfold*, i.e., from 5 to 30 years.

The term "shall" separates the carjacking offense and the penalty clauses, yet the enhanced penalty clauses contain elements. *Id.* at 1219. One must consider the "traditional treatment of certain categories of important facts" in particular crimes. *Id.* at 1220. "If a given statute is unclear about treating such a fact as element or penalty aggravator, it makes sense to look at what other statutes have done, on the fair assumption that Congress is unlikely to intend any radical departures from past practice without making a point of saying so." *Id.*

The Gun Control Act has always treated types of weapons, including "firearm" and "machinegun," as elements of

offenses.[6] Most offenses under Title I of the Act concern "firearms." 18 U.S.C. §§ 921(a)(3)(A) ("firearm"), 922 & 924 (offenses). Besides § 924(c), conduct with a "machinegun" (defined at § 921(a)(23)) is made unlawful in §§ 922(a)(4), 924(a)(1)(B) (knowingly transport in commerce); §§ 922(b)(4), 924(a)(1)(D) (willful transfer); §§ 922(o), 924(a)(2) (knowing possession); § 924(n) (conspiracy to violate § 922(c)). In Title II of the Act, the finding of a "machinegun" or other firearm type is an element of every offense. 26 U.S.C. § 5845(a)(6), (b) (definition), § 5861 (prohibited acts).[7]

Where the jury finds beyond a reasonable doubt that an item is a machinegun and that an unlawful act occurred, the maximum imprisonment is 10 years. 18 U.S.C. § 924(a)(2); 26 U.S.C. § 5871. It would be incongruous to believe Congress authorized a judge to find the facts in § 924(c) such as would authorize a 30-year sentence.

The following rule in *Jones* decides the issue here: "Where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise and by the other of which such questions are avoided, our duty is to adopt the latter." 119 S.Ct. at 1222. Under the government's construction, "the statute would be open to constitutional doubt in light of a series of cases over the past quarter century, dealing

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[6] State statutes have also done so. *E.g.*, *State v. Kang*, 84 Haw. 352, 933 P.2d 1386 (App. 1997) (indictment alleging "rifle" insufficient to allow enhanced sentence for "semiautomatic" weapon).

[7] Whether a firearm is a machinegun may be a hotly contested jury issue. *E.g.*, *United States v. Hitt*, 981 F.2d 422, 423 (9th Cir. 1992); *United States v. Staples*, 971 F.2d 608, 613-15 (10th Cir. 1992), *rev'd. on other grounds*, 511 U.S. 600 (1994).

with due process and the guarantee of trial by jury." *Id.*[8]

McMillan v. Pennsylvania, 477 U.S. 79 (1986) held that the fact of visible possession of a firearm may be a sentencing factor if such finding does not trigger a potential sentence outside the range otherwise prescribed.[9] However, "the result might have been different if proof of visible possession had exposed a defendant to a sentence beyond the maximum that the statute otherwise set without reference to that fact."[10] *Jones*, 119 S.Ct. at 1223-24. That recognizes a question under the due process and jury guarantees: "when a jury determination has not been waived, may judicial factfinding by a preponderance support the application of a provision that increases the potential severity of the penalty for a variant of a given crime?" *Id.* at 1224.

Jones states the following as "the principle animating our view that the carjacking statute, as construed by the Government, may violate the Constitution":

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[8] *See In re Winship*, 397 U.S. 358, 364 (1970); *Mullaney v. Wilbur*, 421 U.S. 684 (1975); *Patterson v. New York*, 432 U.S. 197 (1977). On the historical rule that every fact constituting aggravation of an offense had to be alleged and proven to the jury, *see* M. Knoll & R. Singer, *Searching for the "Tail of the Dog": Finding "Elements" of Crimes in the Wake of* McMillan v. Pa., 22 Seattle U.L.Rev. 1057, 1062-81 (1999).

[9] The law in *McMillan* explicitly provided that 5 years shall be added to the sentence for certain crimes if the judge finds, by a preponderance of the evidence, that the person visibly possessed a firearm, which "shall not be an element of the crime." *Id.* at 81 & n. 1, 83.

[10] *McMillan* observed that the 5-year enhancement is far smaller than the 20 and 10 year sentences imposed for the actual offenses, and thus "the statute gives no impression of having been tailored to permit the visible possession finding to be a tail which wags the dog of the substantive offense." *Id.* at 88. The tail wags the dog if § 924(c) is interpreted such that the substantive offense is only 5 years and the "enhancement" is 30 years.

> *[U]nder the Due Process Clause of the Fifth Amendment and the notice and jury trial guarantees of the Sixth Amendment, any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt.* Because our prior cases suggest rather than establish this principle, our concern about the Government's reading of the statute rises only to the level of doubt, not certainty.

Id. at 1224 n. 6 (emphasis added).

Interpretation of the enhancement provisions as mere sentencing factors reduces the jury function to "low-level gatekeeping," i.e., the jury finding of fact necessary for a 15-year sentence opens the door to a judicial finding sufficient for a 25 year sentence. *Id.* at 1224. Here, interpretation of enhanced firearm types as sentencing factors reduces the jury to even lower-level gatekeeping, in that the jury's finding of fact necessary for a 5-year sentence opens the door to a judicial finding triggering a 30-year sentence.

Trial by jury is secure only "so long as this palladium remains sacred and inviolate, not only from all open attacks, . . . but also from all secret machinations, which may sap and undermine it; by introducing new and arbitrary methods of trial . . . ." *Id.* at 1225, quoting 4 Blackstone, *Commentaries* 342-344. The judicial transformation of an offense element into a sentencing factor may be tempting in emotional cases where juries acquit defendants of serious charges. Here, the jury acquitted the defendants of murder charges and convicted them only of manslaughter and the "gun count." The acquittals were nullified when, contrary to every circuit to have considered the issue (see *infra*), the court elevated the "gun count" to an

offense with a penalty equivalent to what one might expect for murder.[11]

Almendarez-Torres v. United States, 523 U.S. 224 (1998) held that recidivism, traditionally a sentencing factor, need not be charged in an indictment for unlawful reentry after deportation. "Unlike virtually any other consideration used to enlarge the possible penalty for an offense, . . . a prior conviction must itself have been established through procedures satisfying the fair notice, reasonable doubt, and jury trial guarantees." *Jones*, 119 S.Ct. at 1227.

An example of recidivism as a sentencing factor cited by *Almendarez-Torres* is 18 U.S.C. § 924(e), which imposes an enhanced sentence for possession of a firearm by a felon with three prior convictions.[12] 118 S.Ct. at 1224. But regarding § 924(c), the majority did not dispute the statement in the dissenting opinion by Justice Scalia (joined by Justices Stevens, Souter, and Ginsburg), that recidivism is an offense element "added to another crime":

> [R]ecidivism is recited in a list of sentence-increasing aggravators that include, for example, . . . use of a firearm that is a machine gun, or a destructive device, or

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[11] *Duncan v. Louisiana*, 391 U.S. 145, 156 (1968) noted:
Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard . . . against the compliant, biased, or eccentric judge. . . . Beyond this, the jury trial provisions in the Federal and State Constitutions reflect a fundamental decision about the exercise of official power--a reluctance to entrust plenary powers over the life and liberty of the citizen to one judge or to a group of judges.

[12] Recidivism is often an element. To convict for being a felon in possession of a firearm, 18 U.S.C. § 922(g), the jury must find not just the possession but also the felony conviction, which in turn was decided by a prior jury. *Richardson v. United States*, 119 S.Ct. 1707, 1712 (1999).

> that is equipped with a silencer (18 U.S.C. § 924(c)) . . . . It would do violence to the text to treat recidivism as a mere enhancement while treating the parallel provisions as aggravated offenses, which they obviously are.[13]

Id. at 1239-40 & n. 3. Use of a machinegun is characterized as an "aggravated offense."

Jones, 119 S.Ct. at 1228, concludes with the following holding:

> In sum, the Government's view would raise serious constitutional questions on which precedent is not dispositive. Any doubt on the issue of statutory construction is hence to be resolved in favor of avoiding those questions. This is done by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict.

Castillo ignores the jurisprudential analysis set forth in *Jones* and seeks to distinguish *Jones* solely on the basis of legislative history:

> In *Jones*, the legislative history contained conflicting indications of whether Congress intended for 18 U.S.C. § 2119, the statute at issue, to lay out three distinct offenses or a single crime with three maximum penalties. See *Jones*, . . . 119 S. Ct. at 1221 . . . . In contrast, the legislative history of § 924(c)(1) discloses that Congress

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[13] § 924(c)(1) (second sentence) provided for 20-years in case of a subsequent conviction, but "if the firearm is a machinegun . . ., to life imprisonment without release." The latter parallels the possibility of life imprisonment under the carjacking statute where death results.

> consistently referred to the machine gun clause as a penalty and never indicated that it intended to create a new, separate offense for machine guns. See *Branch*, 91 F.3d at 739. Accordingly, we decline to reconsider our prior decision that the type of firearm used or carried is a sentencing enhancement, and not an element of the offense.[14]

179 F.3d at 328 (App. 154-55a). *Castillo* does not even state the constitutional issue at stake in *Jones*.[15]

This Court should clarify that *Jones* did not leave the door open for "legislative history" to override the doctrine of constitutional doubt.[16] As here, the court of appeals in *Jones* held the provisions in question to be mere enhancements based on legislative history, including committee reports and floor debates referring to "enhanced penalties for an apparently single

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[14] *United States v. Matthews*, 178 F.3d 295, 301-02 (5th Cir. 1999) (construing 18 U.S.C. § 521(b), which punishes street gang members) also holds that "legislative history" resolves that a criminal provision is a mere sentence enhancement, precluding a *Jones* analysis.

[15] *Cf. United States v. Nuñez*, 180 F.3d 227, 233 (5th Cir. 1999) ("*Jones* teaches us to avoid encroaching on a defendant's Fifth Amendment rights by construing statutes setting out separate punishments as creating separate, independent criminal offenses"). *Nuñez* held the following weapon component of 18 U.S.C. § 111(b) to be an element of the offense: "Enhanced penalty.–Whoever, in the commission of any acts described in subsection (a), uses a deadly or dangerous weapon" is subject to 10 years imprisonment.

[16] "While we recognize the possibility that the legislative history of [18 U.S.C.] § 1791 supports the Government's construction, the Supreme Court [in *Jones*] has cautioned against adopting an otherwise reasonable interpretation of a statute which raises serious constitutional questions." *United States v. Allen*, 1999 U.S. App. LEXIS 24268, *13-14 (11th Cir. 1999) (object "intended to be used as a weapon" is element of offense, not sentencing factor).

carjacking offense." 119 S.Ct. at 1218-19.

Ratzlaf v. United States, 510 U.S. 135, 147-48 (1994) teaches about the role of "legislative history" in criminal statutes:

> There are, we recognize, contrary indications in the statute's legislative history. But we do not resort to legislative history to cloud a statutory text that is clear. Moreover, were we to find § 5322(a)'s "willfulness" requirement ambiguous . . ., we would resolve any doubt in favor of the defendant. . . . *Crandon v. United States*, 494 U.S. 152, 160 (1990) ("Because construction of a criminal statute must be guided by the need for fair warning, it is rare that legislative history or statutory policies will support a construction of a statute broader than that clearly warranted by the text.")

Similarly, "longstanding principles of lenity . . . preclude our resolution of the ambiguity against petitioner on the basis of . . . legislative history." *Hughey v. United States*, 495 U.S. 411, 422 (1990). This Court has eschewed adoption of "some type of reverse parol evidence rule, where oral statements were elevated above enacted language in determining the meaning of the statute."[17] *Garcia v. United States*, 469 U.S. 70, 78 (1984).

In no instance did the legislative history state that a

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[17] *See United States v. R.L.C.*, 503 U.S. 291, 305 (1992) (plurality opinion) ("the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should"); *id.* at 309 (Scalia, J., concurring) (the fiction that one is presumed to know the law "descends to needless farce when the public is charged even with knowledge of Committee Reports"). "One can hardly imagine an 'implication from legislative history' that is 'unmistakable'—*i.e.*, that demonstrates agreement to a proposition by a majority of both Houses and the President—unless the proposition is embodied in statutory text to which those parties have given assent." *Tafflin v. Levitt*, 493 U.S. 455, 472 (1990) (Scalia, J., concurring).

"machinegun" is a sentencing factor and not an element, and the use of the term "penalty enhancement" settles nothing. *See Jones*, 119 S.Ct. at 1221 (only "*assuming* that 'penalty enhancement' was meant to be synonymous with 'sentencing factor,'" the Court "find[s] the quoted statements unimpressive").[18] *Branch*, 91 F.3d at 739 (App. 81-83a) cites instances where the provision was said to be an "enhanced penalty for machine gun use in crime," but that hardly implies that the machinegun is not an element. Homicide with malice aforethought results in an "enhanced penalty," but malice is still an element.

The machinegun clause was added by the Firearms Owners' Protection Act (FOPA), P.L. 99-308, 100 Stat. 449, 457 (1986). The House Judiciary Committee report on H.R. 4227 did not suggest that "machinegun" is not an element. H.Rpt. 99-495, 99th Cong., 2d Sess., 2 (1986). "Although [§ 924(c)] is frequently referred to as a penalty enhancement provision it is in reality a separate offense . . . ." *Id.* at 10.

Rep. Volkmer stated that his substitute for H.R. 4227, which would become FOPA, "includes stiff mandatory sentences for the use of firearms, including machineguns and silencers, in relation to violent or drug trafficking crimes." 132 CONG. REC. H1652 (1986).[19] No one suggested that

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[18] *See United States v. Thompson/Center Arms Co.*, 504 U.S. 505, 517-18 (1992) ("nor are we helped by the NFA's legislative history, in which we find nothing to support a conclusion one way or the other . . . . [W]e are left with an ambiguous statute. . . . It is proper, therefore, to apply the rule of lenity."); *id.* at 521 ("that last hope of lost interpretive causes, that St. Jude of the hagiology of statutory construction, legislative history" is "particularly inappropriate in determining the meaning of a statute with criminal application.") (Scalia, J., concurring).

"firearm" and "machinegun" were not intended to be treated *in pari materia* as offense elements.

Castillo ruled that defendants may not rely on the doctrine of constitutional doubt or the rule of lenity because these arguments were not made in the first appeal. 179 F.3d at 328 (App. 155a). Yet these are interpretative rules, not points of error. *E.g., Thompson/Center Arms*, 504 U.S. at 518 n. 10 ("the rule of lenity, however, is a rule of statutory construction"). Defendants argued from the beginning that the firearm types are elements of the offense.

While *Castillo* also relied on the law of the case, *Jones* is an intervening decision that clarifies the doctrine of constitutional doubt while construing a statute structurally identical to § 924(c). A "Court of Appeals err[s] in adhering to law of the case doctrine despite intervening Supreme Court precedent." *Agostini v. Felton*, 521 U.S. 203, 236 (1997), citing *Davis v. United States*, 417 U.S. 333, 342 (1974). "New rules always have retroactive application to criminal cases on direct review." *Brecht v. Abrahamson*, 507 U.S. 619, 634 (1993).

Further, it was plain error not to apply the rule of lenity. Regarding whether the machinegun provision is an element or an enhancement, *Branch* conceded: "The text of § 924(c) forecloses neither of these two competing readings of the statute." 91 F.3d at 739 (App. 81a). "When choice has to be made between two readings of what conduct Congress has

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[19] Rep. Gallo explained that the Volkmer substitute mandates "a 5-year mandatory prison sentence for any person who uses a firearm during commission of a drug trafficking crime; provides a mandatory prison term of 10 years for using a machinegun during commission of a crime . . . ." *Id.* at H1666. *See id.* at H1747 (remarks of Rep. Miller).

made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite." *United States v. Bass*, 404 U.S. 336, 347-48 (1971) (Gun Control Act). "This policy of lenity means that the Court will not interpret a federal criminal statute so as to increase the penalty that it places on an individual when such an interpretation can be based on no more than a guess as to what Congress intended." *Simpson v. United States*, 435 U.S. 6, 15 (1978) (also holding that "§ 924(c) creates an offense distinct from the underlying federal felony," *id.* at 10).

In sum, *Branch* and *Castillo* are inconsistent with the teachings of *Jones* about how criminal statutes must be interpreted. According to the Fifth Circuit, legislative history (in this case, an ambiguous one) overrides any consideration of the doctrine of constitutional doubt. Serious questions are raised under the Fifth and Sixth Amendments by an interpretation that reduces the jury's role to finding facts that would result in a five year sentence and which in turn authorizes a judge to find facts which result in a thirty year sentence. This Court should resolve the substantial question of whether, applying the *Jones* rules of construction, the firearm type is an element of the offense under § 924(c).

II. THIS COURT SHOULD RESOLVE THE CIRCUIT CONFLICT ON WHETHER, UNDER 18 U.S.C. § 924(C), THE INDICTMENT MUST ALLEGE AND THE JURY MUST FIND USE OF AN ENHANCED FIREARM

The *Branch/Castillo* decisions are contrary to the interpretation adopted by the First, Fourth, Sixth, and Ninth Circuits, and a district court in the Second Circuit, which hold

the type of weapon to be an element of the offense. Further, the practice in other circuits is to allege the type of firearm in the indictment and submit the issue to the jury. The Eleventh Circuit and a panel of the First Circuit have agreed with the Fifth, although in regard to firearms which give rise only to ten year sentences. Given the large number of § 924(c) prosecutions and the extreme discrepancy in sentences in the different circuits, this Court should resolve the conflict.

In response to the prior petitions for a writ of certiorari, the United States conceded that the decision here conflicts with the rule in other circuits. Brief for the U.S. in Opposition, *Castillo v. United States*, No. 96-989, at 22, citing *United States v. Alerta*, 96 F.3d 1230, 1235 (9th Cir. 1996); *United States v. Melvin*, 27 F.3d 710, 714 (1st Cir. 1994); and *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, 507 U.S. 932 (1993). The circuit split has deepened since then.

The United States opposed the granting of the writ because the sentences had been vacated and, if defendants were resentenced to five years, the issue would be moot. "After petitioners have been resentenced on Count 3, they will have a further opportunity to contest their sentences . . . in this Court." Brief for the U.S. at 22.

In *Sims*, the first decided case on point, one count alleged use of a machinegun and other counts alleged firearms. The Sixth Circuit held that, to avoid double jeopardy where only one predicate offense exists, multiple § 924(c) counts must be consolidated into one count. 975 F.2d at 1233. *Sims* explained:

> This may be accomplished prior to trial by consolidating those counts into a single section 924(c) count and submitting special interrogatories or a special verdict form to the jury, requiring that if the jury returns a guilty verdict on the gun charge, it must specify which category or categories of weapons it unanimously has found the defendant was using or carrying. Or, it may be accomplished by submitting the separate gun counts to the jury and, should there be more than one conviction, merging those convictions after trial.

Id. at 1235. Thus, the jury must determine whether the defendant used a "firearm" or a "machinegun."[20] *Id.* at 1236.

Sims was followed in *United States v. Martinez*, 7 F.3d 146, 148 n. 1 (9th Cir. 1993), which agreed that where different firearm types are charged, the court should "(1) submit separate counts under section 924(c)(1) to the jury, and, if there is more than one conviction, merge those convictions after the trial, or (2) submit one section 924(c)(1) charge to the jury to specify which weapon or weapons the defendant used or carried." The jury convicted the defendant of one predicate count, one machinegun count, and one firearm count. *Id.* at 147. Since "the jury found that Martinez used or carried both weapons," the counts must be merged and defendant sentenced only for the

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[20] The Fifth Circuit initially agreed. Relying on *Sims*, *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 n. 35 (5th Cir. 1993) noted:

> If a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms.

machinegun. *Id.* at 149.

In *Melvin*, the First Circuit noted that "all parties concede that the jury mistakenly was not asked to identify which of the six firearms at issue in this case--ranging from machine guns to handguns--underlay its guilty verdict . . . ." 27 F.3d at 711. The government agreed that a defendant could be sentenced to 30 years "only if the jury specifically identifies a machine gun or silencer as the firearm supporting the conviction," but argued that the jury "implicitly" found use of machineguns, *id.* at 714, and that "the record" showed such use. *Id.* at 712. The district court found based on a preponderance of the evidence that machineguns were used. *Id.*

Melvin decided that "we may not exclude beyond a reasonable doubt the possibility that the jury rendered a guilty verdict . . . based on a determination that the defendants possessed only a handgun . . . ." *Id.* at 715. The verdict did not establish that defendants used "weapons subject to a term of imprisonment greater than five years." *Id.*

In *United States v. Shepard*, No. 94-5307, 1995 U.S. App. LEXIS 5802, *11 (4th Cir. March 22, 1995), the indictment alleged use of a sawed-off shotgun "and" pistols. "§ 924(c)(1) would require a ten-year mandatory-minimum sentence if Appellants were *convicted* of using or carrying a sawed-off shotgun, while the mandatory-minimum sentence would be five years if Appellants were *convicted* of using or carrying either or both of the pistols." *Id.* at *9-10 (emphasis added). As *Melvin* held, a court could not impose a higher penalty where the "charge alleged two objects with differing penalties in the disjunctive and the jury returned a general verdict of guilt." *Id.* at *12. But here the jury was instructed with "the conjunctive listing of the weapons." Thus, the jury

found that defendants used both firearm types.[21] *Id.*

United States v. Rodriguez, 841 F.Supp. 79, 81 (E.D.N.Y. 1994), *aff'd* 53 F.3d 545 (2d Cir.), *cert. denied*, 516 U.S. 893 (1995), rejected the argument that "the enhanced penalty for use of a firearm equipped with a silencer is not a matter for the jury in determining whether guilt has been proved, but only for the court in sentencing." The court noted about *United States v. Harris*, 959 F.2d 246, 258-59 (D.C.Cir.), *cert. denied*, 506 U.S. 932 (1992):

> The *Harris* jury was asked to decide (1) whether the defendant knowingly possessed and used a firearm, and (2) whether that firearm was, in fact, a machinegun. . . . So too in this case, the jury will have to find . . . that the firearm at issue was equipped with a silencer.

Rodriguez, 841 F.Supp. at 81-82.

United States v. Alerta, 96 F.3d 1230, 1232 (9th Cir. 1996) reversed a 30-year sentence because "the jury did not expressly find that Alerta carried or used a machine gun." The jury instruction charged him with use of "pistols" and "machineguns." *Id.* at 1234. The jury found him guilty but did not specify whether a pistol (which is a "firearm") or a machinegun was used. *Id. Alerta* held:

> It is therefore possible that the jury found only that Alerta used one or more of the weapons that were not machine guns, in which case the requisite consecutive sentence for Count 5 would be 5 years, not the 30-year sentence that Alerta received. . . .

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[21] *See United States v. Wills*, 88 F.3d 704, 719 (9th Cir. 1996) (defendant "convicted for using a gun during the commission of a bank robbery *and* for using a destructive device" in the same crime properly sentenced only for the count with the highest sentence).

> Because of the immense consequences that follow a determination whether a firearm used in violation of section 924(c)(1) is an ordinary firearm or, at the other extreme, a machine gun, we have stated that a jury finding on that issue is required.

Id. at 1234-35.

Where both "firearms" and "machineguns" are alleged, either separate counts or special interrogatories should be submitted to the jury. Rejecting the argument that the firearm type is not an element of the offense, *Alerta* explained:

> We reject the government's contention, as applied to instances where the government seeks more than the minimum 5-year consecutive sentence. The entire purpose of our requiring a special verdict or separate charges in *Martinez* was that the jury find beyond a reasonable doubt that the defendant used a machine gun. If the 30-year consecutive sentence is to be imposed under section 924(c)(1), the fully automatic character of the firearm must be found by the jury; that is to say, it is an element of the crime.

Id. at 1235.

The jury may well have found only that a "firearm" was involved, the consequence of which *Alerta* stated to be as follows:

> Thus, for all we can know, Alerta may have been sentenced to 30 years without a finding by the jury that he used or carried a machine gun. That we cannot permit, despite the very strong evidence that Alerta used or carried a machinegun. "'[T]he question is not whether guilt may be spelt out of a record, but whether guilt has been found by a jury according to the procedure and standards appropriate for criminal trials.'"

Id. at 1236 (citation omitted).[22] *Alerta* has been followed in further decisions.[23]

Identification of firearm type in the indictment and jury instructions is the accepted standard in other circuits. *E.g.*, *United States v. Feinberg*, 98 F.3d 333, 339 (7th Cir. 1996) (destructive device); *United States v. Shuler*, 181 F.3d 1188, 1189 (10th Cir. 1999) (machinegun).

Two circuits have followed *Branch* without offering any original analysis. *United States v. Alborola-Rodriguez*, 153 F.3d 1269, 1271-72 (11th Cir. 1998); *United States v. Shea*, 150 F.3d 44, 51-52 (1st Cir. 1998), *cert. denied*, 142 L.Ed.2d 473 (1998). Because these involved firearm types (a short-barreled shotgun and an assault weapon) with sentences of only 10 years, they do not consider whether a 30-year "sentence enhancement" is "a tail which wags the dog of the substantive offense," *McMillan*, 477 U.S. at 88. *Shea* contradicts the First Circuit's holding in, and does not even cite, *Melvin*, *supra*, which is binding under the law of the circuit.[24]

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[22] *Alerta* was remanded for retrial. *Id.* at 1236. Here, defendants were never indicted for a machinegun and thus could not be retried on a new indictment, but could only be resentenced to no more than 5 years.

[23] *United States v. Ramirez-Rangel*, 103 F.3d 1501, 1507 (9th Cir. 1997) ("If the firearm is one that requires more than the five-year mandatory minimum sentence, the nature of the firearm will have been established by the verdict."); *United States v. Perez*, 129 F.3d 1340, 1342 (9th Cir. 1997) (indictment alleged use of pistols with silencers "or" an assault weapon; it was error not to instruct the jury to find firearm type, which "is an element of the offense").

[24] Two other circuits have suggested in dictum that firearm type is not an element, but in both cases that firearm type was found by the jury. *United States v. Gilliam*, 167 F.3d 628, 638 (D.C. Cir. 1999) (indictment charged and jury found semiautomatic firearm); *United States v. Eads*, 1999 U.S. App. LEXIS 20966, *17-21 (10th Cir. 1999) (agreeing with *Branch*-

The Fifth Circuit's position has the side effect of radically departing from *Bailey v. United States*, 516 U.S. 137, 148 (1995), which held that it is a jury function to determine whether a firearm was used: "The question we face today [is] what *evidence is required to permit a jury to find* that a firearm had been used at all." (Emphasis added). Since the "carry or use" element is a jury issue, by implication *what* is carried or used must also be a jury issue. An item a judge finds at sentencing is a machinegun might not have been the "firearm" the jury found to be "used."

Defendants here disputed the sentencing court's finding that each "either had actual or constructive possession" of machineguns during the 51 day siege. *Branch*, 91 F.3d at 740 (App. 85a). *Branch* held that finding to be inadequate because "§ 924(c) requires more than 'mere possession' . . . . The Government must show 'active employment' of the firearm." *Id.* (App. 86a), citing *Bailey*, 516 U.S. 137-38. *Branch* vacated the sentences and remanded for resentencing with the following directive: "Should the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence." *Id.* Yet *Bailey* made clear that whether a firearm was used is a jury question, and implicit in finding "use" is finding what was used.

Assume a jury finds that a defendant used item X and that X is a "firearm." Assume the jury finds that the defendant possessed but did not carry or use item Y. The jury might also find that item Y is not a machinegun. The jury then renders a

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Castillo that "legislative history" distinguishes *Jones*; jury found machinegun). *Cf. United States v. Davis*, 184 F.3d 366, 1999 U.S. App. LEXIS 15614, *10-12 (4th Cir. 1999) (*Jones* requires interpretation that "great bodily injury" in vehicle offense is an element).

general verdict that defendant used a firearm. At sentencing, the judge decides that item Y is a machinegun and, based on the jury verdict that defendant used a firearm, imposes 30 years imprisonment. That cannot be consistent with *Bailey*.

The *Branch* remand, which allowed the sentencing judge to make findings never charged in the indictment or considered by the jury, conflicts with the disposition by other circuits of post-*Bailey* remands. The other circuits focus on whether sufficient evidence existed for the jury to find beyond a reasonable doubt the use or carrying of a firearm, a machinegun, or other weapon as alleged in the indictment.[25]

The Fifth Circuit exacerbates this conflict by authorizing the sentencing court to attribute a co-conspirator's use of an enhanced firearm to a defendant. While *Branch* was silent on the source for this novel doctrine, the district court based it on *Pinkerton v. United States*, 328 U.S. 640 (1946) (App. 125-27a), and *Castillo* sanctions this theory.[26] 179 F.3d at 329-30

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[25] *E.g.*, *United States v. Santos*, 84 F.3d 43, 46-47 & n. 3 (2nd Cir. 1996) (insufficient evidence under *Bailey* to sustain jury verdict under indictment charging use of "firearms," including "handgun which was then equipped with a silencer"); *United States v. Garcia*, 77 F.3d 274, 276-77 (9th Cir. 1996) ("prior to *Bailey*, the jury could have properly inferred that Garcia 'used' the machinegun"); *United States v. Thompson*, 82 F.3d 849, 851-52 (9th Cir. 1996) (improper instruction on "use" of firearm equipped with silencer).

[26] Besides *Pinkerton* liability, the district court found that Branch and Avraam used a machinegun on February 28. However, its finding that Castillo and Craddock carried a hand grenade on April 19 (App. 168a) is irrelevant in that the indictment charged them only with using firearms on February 28. *Richardson v. United States*, 119 S.Ct. 1707, 1711 (1999) notes that "we would not permit . . . an indictment charging that the defendant assaulted either X on Tuesday or Y on Wednesday." Nor is it permissible to sentence a defendant for assaulting Y on Wednesday when he was only indicted for and convicted of assaulting X on Tuesday.

(App. 158-60a). Yet *Pinkerton* involved responsibility for acts of co-conspirators being found by the jury. 328 U.S. at 645. *See Pereira v. United States*, 347 U.S. 1, 10 n. (1954) (no matter what "the record demonstrates," *Pinkerton* is inapplicable absent jury finding).[27] Here, the jury convicted each defendant under instructions asking if "the Defendant under consideration knowingly used or carried a firearm during and in relation to" the predicate offense. (23 R. 1232, in RE tab 10)

Branch-Castillo push the *Bailey* and *Pinkerton* envelopes outside any limits sanctioned by this Court. The Fifth Circuit's holding creates spinoff conflicts in the circuits on the roles of juries and trial judges and in respect to sentencing rationales for vicarious liability for acts of co-conspirators.

This Court should resolve the circuit conflict. In some circuits, if the indictment alleges and the jury finds use of a "firearm," the sentence is limited to five years, but in other circuits, the trial judge can impose thirty years. Given the large number of § 924(c) cases prosecuted in the courts, this discrepancy should not continue.

CONCLUSION

This Court should grant this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit.

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[27] Nor does U.S.S.G. § 1B1.3, which provides "the base offense level where the guideline specifies more than one base offense level," authorize sentencing for vicarious liability here. § 2K2.4, the guideline for § 924(c), states that "the term of imprisonment is that required by statute" and does not specify any base offense level.

STEPHEN P. HALBROOK*
10560 Main Street, Suite 404
Fairfax, Virginia 22030
(703) 352-7276
Counsel for Petitioner Jaime Castillo

*Counsel of Record

John F. Carroll
111 West Olmos
San Antonio, Texas 78212
(210) 829-7183
Counsel for Petitioner Renos Avraam

Richard G. Ferguson
P.O. Drawer 7695
Waco, Texas 76714
(254) 772-5525
Counsel for Petitioner Brad Eugene Branch

Stanley Rentz
506 Franklin Avenue
Waco, Texas 76701-2111
(254) 755-7023
Counsel for Petitioner Graeme Leonard Craddock

Steven R. Rosen
440 Louisiana, Suite 2100
Houston, Texas 77002
(713) 227-2900
Counsel for Petitioner Kevin A. Whitecliff

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IN THE UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 94-50437

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

BRAD EUGENE BRANCH, KEVIN WHITECLIFF,
JAIME CASTILLO, RENOS LENNY AVRAAM,
PAUL FATTA AND GRAEME LEONARD CRADDOCK,

Defendants-Appellants.

Appeals from the United States District Court
for the Western District of Texas

August 2, 1996

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and SCHWARZER*, District Judge.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

This is an appeal of six defendants convicted of federal crimes for their role in the dramatic and tragic events at Mount Carmel outside Waco, Texas during the early months of 1993. A firefight erupted when federal agents from the Bureau of Alcohol, Tobacco, and Firearms attempted to execute a search and arrest warrant on February 28, 1993. Four agents and three residents of the compound lost their lives. Each defendant now challenges his conviction and sentence.

I.

The Branch Davidians are a 65-year-old sect originally affiliated with the Seventh Day Adventist Church. Their faith urges a life of Bible study with emphasis on an imminent, apocalyptic confrontation between the Davidians and the "beast". The group's leader, Vernon Howell, instructed members to arm themselves in preparation for the final battle. Howell changed his name to David Koresh in 1990 and preached that "if you can't kill for God, you can't die for God." He told his followers that the "beast" included the U.S. Government and, specifically, the ATF.

---

* District Judge of the Northern District of California, sitting by designation.

Koresh and other Davidians stockpiled weapons and ammunition. They fortified the compound called Mount Carmel, building a two-foot high concrete barrier and an underground bunker. Koresh used "Bible studies" to instruct the residents in the use of firearms. In short, the Davidians turned Mount Carmel into a small fortress.

The ATF discovered that the Davidians had amassed weapons, including fully automatic machineguns and hand grenades. On February 25, 1993, ATF agents obtained an arrest warrant for Koresh and a search warrant for the Mount Carmel compound.

The ATF decided to execute the search and arrest warrant on February 28, 1993, but, as it was to learn, the element of surprise had been lost. Shortly before the 28th, an article in the local newspaper had speculated that federal agents would likely come for Koresh. Around 8:00 A.M., an undercover ATF agent, Roberto Rodriguez, visited the Davidian compound and spoke with Koresh. During the conversation, Koresh took a phone call. When he returned, a visibly shaken Koresh told Rodriguez, "Robert, neither the ATF or National Guard will ever get me. They got me once, they'll never get me again." Koresh then walked over to the windows and looked toward the farmhouse used by the undercover ATF agents. He turned to Rodriguez and said, "They're coming, Robert. The time has come." Rodriguez left the compound around 9:00 A.M. and advised the ATF that Koresh had learned of the raid at least forty-five minutes earlier. The ATF decided to proceed with the arrest and search warrants.

When the ATF's decision to continue was made, approximately 115 men, women, and children, ranging in age from 6 months to 70 years, resided at Mount Carmel. The ATF plan called for ATF agents, who were transported to the compound in two cattle trailers, to quickly unload and encircle the compound, while National Guard helicopters conducted a diversionary raid on the rear of the Mount Carmel compound.

The plan quickly went awry. The helicopters did not arrive until after the ATF agents had begun unloading from the cattle trailers. As the agents unloaded, gunfire erupted from the compound. The agents returned fire. In the ensuing gunbattle, four agents and three Davidians were killed. Twenty-two ATF agents and four Davidians were wounded.

The FBI then surrounded the compound, and, for 51 days. law enforcement and the Davidians were at a stand-off. During the stand-off, approximately 30 Davidians left the compound and were taken into custody. On April 19, FBI agents attempted to end the stand-off by flooding the compound with gas, but the Davidians did not leave. Around noon. the Davidians set the compound on fire. Seventy-five of the remaining 84 occupants perished in the blaze.

On August 3, 1993, a grand jury returned a superseding 10-count indictment against twelve of the surviving Davidians. The counts relevant to this appeal are:

> Count 1: From on or before February 19, 1992, to April 19, 1993, conspiracy to murder federal officers

> and employees engaged in the performance of their official duties in violation of 18 U.S.C. § 1117.
>
> Count 2: On or about February 28, 1993, aiding and abetting the murder of four agents of the Bureau of Alcohol, Tobacco & Firearms (ATF) while said agents were engaged in the performance of their official duties, in violation of 18 U.S.C. §§ 1111(a), 1114 and 18 U.S.C. § 2.
>
> Count 3: On or about February 28, 1993, using or carrying of a firearm during and in relation to a crime of violence, to wit,.Count 1, in violation of 18 U.S.C. § 924(c)(1).
>
> Count 7: On or about April 19, 1993, knowing and unlawful possession of a firearm, namely an explosive grenade, in violation of 26 U.S.C. § 5861(d).
>
> Count 9: From on or about February 19, 1992 to February 1993, a conspiracy to unlawfully manufacture and possess machineguns in violation of 18 U.S.C. § 371 and 18 U.S.C. § 922(*o*).
>
> Count 10: In February, 1992 to February 19, 1993, aiding and abetting in the unlawful possession of machineguns in violation of 18 U.S.C. §§ 2, 922(*o*).

The Government dismissed the charges against one of the twelve Davidians, Kathryn Schroeder, pursuant to a plea bargain. After a jury trial lasting nearly two months, the jury acquitted four of the Davidians on all counts on which they

were charged. The jury also acquitted all eleven of the Davidians on Count 1, which alleged a conspiracy to murder federal agents. However, the jury found seven of the Davidians, Renos Avraam, Brad Branch, Jaime Castillo, Graeme Craddock, Livingstone Fagan, Ruth Riddle, and Kevin Whitecliff, guilty on Count 3 for using or carrying a firearm during a crime of violence. The jury acquitted all eleven of the defendants on Count 2 for aiding and abetting the murder of federal agents but convicted Avraam, Branch, Castillo, Fagan, and Whitecliff on the lesser-included offense of aiding and abetting the voluntary manslaughter of federal agents. Finally, the jury convicted Craddock on Count 7 for unlawful possession of a hand grenade and convicted Paul Fatta on Counts 9 and 10 for conspiring to manufacture and possess machineguns and for aiding and abetting the unlawful possession of machineguns, respectively.

The district court sentenced the defendants to prison terms ranging from 15 to 40 years, along with fines and restitution. Six of the eight Davidians are now before us, appealing both their convictions and sentences. They have raised a host of contentions. We first address the constitutionality of Fatta's firearms convictions. We then turn to the arguments concerning the jury instructions and the district court's conduct of the trial. We then address the sufficiency of the evidence. Finally, we review the sentences imposed by the district court.

II.

The jury convicted Fatta of conspiring to unlawfully manufacture and possess machineguns (Count 9) and aiding and abetting the unlawful possession of machineguns (Count 10), both in violation of 18 U.S.C. § 922(*o*). On the eve of trial, Fatta moved to dismiss the indictment on both counts. He argued that § 922(*o*) exceeded Congress' powers under the Commerce Clause. The district court disagreed, noting that several other circuits had upheld the constitutionality of § 922(*o*). *See United States v. Hale*, 978 F.2d 1016 (8th Cir. 1992), *cert. denied*, 507 U.S. 997, 113 S.Ct. 1614, 123 L.Ed.2d 174 (1993); *United States v. Evans*, 928 F.2d 858 (9th Cir. 1991). We review de novo the district court's ruling.

18 U.S.C. § 922(*o*) prohibits, subject to two, narrow exceptions not relevant here, any person from transferring or possessing a machinegun. There is no requirement that the machinegun have been in interstate commerce. Subsequent to the district court's ruling, we held in *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), that § 922(*o*) did not exceed Congress' power under the Commerce Clause. That panel decision has been vacated, and the case is currently pending before the en banc court. 78 F.3d 160 (5th Cir. 1996).

The en banc court's resolution of this issue will govern the ultimate validity of Fatta's convictions on Counts 9 and 10. Under pre-*Kirk* caselaw now binding this panel, we must reject this contention. We will, however, hold the mandate pending decision in *Kirk*.

III.

The district court instructed the jury that to convict the defendants of murder under Count 2, it had to find beyond a reasonable doubt that "the Defendant under consideration did not act in self-defense or defense of another." The court explained self-defense and the defense of another, and then turned to the lesser-included offense of voluntary manslaughter.

Avraam, Branch, Castillo, and Whitecliff argue that self-defense is also a defense to voluntary manslaughter. The Davidians requested an instruction to that effect and objected at the charge conference to its omission.

A.

We review the district court's refusal to give the proposed instruction for abuse of discretion. *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993). "As a general proposition a defendant is entitled to an instruction as to any recognized defense for which there exists evidence sufficient for a reasonable jury to find in his favor," *Mathews v. United States*, 485 U.S. 58, 63, 108 S.Ct. 883, 886, 99L.Ed.2d 54 (1988), and we presume an abuse of discretion "where the district court 'refuse[s] a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent." *Id.* (quoting *United States v. Rubio*, 834 F.2d 442, 446 (5th Cir. 1987)). The court may, however, refuse to give a requested instruction that lacks sufficient foundation in the evidence. *United States v.*

Tannehill, 49 F.3d 1049, 1057 (5th Cir.), *cert. denied*, --- U.S. ---, 116 S.Ct. 167, 133 L.Ed.2d 109 (1995).

We review the record cognizant that the "merest scintilla of evidence" in the defendant's favor does not warrant a jury instruction regarding an affirmative defense for which the defendant bears the initial burden of production. *United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984). Under *Mathews*, there must be "evidence sufficient for a reasonable jury to find in [the defendant's] favor." We have insisted that the evidence be sufficient to raise a factual question for a reasonable jury. *See United States v. Lucien*, 61 F.3d 366, 374-77 (5th Cir. 1995); *United States v. Jones*, 839 F.2d 1041, 1053 (5th Cir.), *cert. denied*, 486 U.S. 1024, 108 S.Ct. 1999, 100 L.Ed.2d 230 (1988).

Our decisions leave no doubt that while a particular piece of evidence standing alone may support inferences that warrant an instruction, those inferences may evaporate after reviewing the entire record. For example, in *United States v. Ivey*, 949 F.2d 759, 768-69 (5th Cir. 1991), *cert. denied*, 506 U.S. 819, 113 S.Ct. 64, 121 L.Ed.2d 32 (1992), we affirmed the district court's refusal to instruct the jury on the defense of entrapment. We explained that evidence supporting entrapment was overwhelmed by other evidence in the record and there was no need to instruct the jury regarding it. *Id.*; *see also United States v. Pruneda-Gonzalez*, 953 F.2d 190, 197 (5th Cir.) (holding evidence of entrapment was insufficient to shift burden of persuasion to government), *cert. denied*, 504 U.S. 978 (1992); *United States v. Stanley*, 765 F.2d 1224, 1234-35 (5th Cir. 1985) (same). The requirement that the evidence be sufficient to persuade a

reasonable juror is not limited solely to the defense of entrapment but extends to all defenses for which the defendant bears the initial burden of production. *See United States v. Liu*, 960 F.2d 449, 454 (5th Cir.) (duress), *cert. denied*, 506 U.S. 957, 113 S.Ct. 418, 121 L.Ed.2d 341 (1992). A district court cannot refuse to give an instruction for which there is sufficient evidence in the record for a reasonable juror to harbor a reasonable doubt that the defendant did not act in self defense, but the district court is not required "to put the case to the jury on a basis that 'essentially indulges and even encourages speculations.'" *United States v. Collins*, 690 F.2d 431 (5th Cir. 1982) (affirming refusal to give lesser-included offense instruction), *cert. denied*, 460 U.S. 1046 (1983).

The dissent measures the evidence in the record by an incorrect standard, misled by our statements in *Perez v. United States*, 297 F.2d 12 (5th Cir. 1961), and *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967), that the district court must instruct the jury on a defense for which there is "any foundation in the evidence." The measure of "any evidence" never commanded allegiance. *See United States v. Andrew*, 666 F.2d 915, 922-24 & nn. 10,11 (5th Cir. 1982) (quorum) (noting intracircuit split on the issue). To the contrary, panels of this court were chary of literally applying *Perez* and *Strauss*. *See United States v. Fischel*, 686 F.2d 1082, 1086 n.2 (5th Cir. 1982) (refusing to resolve split); *United States v. Leon*, 679 F.2d 534, 539 n.5 (5th Cir. 1982) (same). If the matter rested there, the dissent would, perhaps, be justified in exploiting this dissonance. *Mathews*, however, resolved the matter. Indeed, in *United States v. Stowell*, 953 F.2d 188 (5th Cir.), *cert. denied*, 503 U.S. 908,

112 S.Ct. 1269, 117 L.Ed.2d 497 (1992), *and cert. denied*, 506 U.S. 902, 113 S.Ct. 292, 121 L.Ed.2d 217 (1992), we explained:

> Although we have on several occasions before and after *Mathews* observed that the court must charge the jury on a defense theory when there is any evidence to support it, this language is admittedly incomplete. Its shorthand implies that a mere scintilla of evidence in support of a defense theory requires the giving of an instruction on that theory at the defendant's request. Of course, any evidence in support of a defensive theory must be sufficient for a reasonable jury to rule in favor of the defendant on that theory. This is what we meant when we stated in this case that a court may decide as a matter of law that the evidence . . . fails to raise a factual question for the jury.

Id. at 189 (citations omitted). Similarly, Judge Posner in *United States v. Perez*, 86 F.3d 735, 736 (7th Cir. 1996), interpreted *Mathews* as rejecting the notion that "any evidence," no matter how weak or insufficient, entitled the defendant to an instruction on an affirmative defense. Not surprisingly, all but one of the decisions reiterating the "any evidence" standard of *Perez* and *Strauss* came prior to *Mathews*. And *United States v. Kim*, 884 F.2d 189, 193 (5th Cir. 1989), the only decision in this circuit to cite either *Perez* or *Strauss* after *Mathews*, did not involve the question whether there was sufficient evidence to warrant the requested jury instruction.

The dissent relies upon dicta from the century-old decision of *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896), but that reliance is mistaken. *Stevenson*, which addressed the evidence needed to trigger a jury instruction regarding a lesser-included offense, did not embrace the proposition that even a scintilla of evidence warrants a jury instruction. To the contrary, *Stevenson* expressly noted that "[t]here might be cases where the uncontradicted evidence was so clear and overwhelming" to justify refusing to instruct the jury on the lesser-included offense. *Id.* at 321. Indeed, the Court in *Stevenson* referred with approval to its earlier decision in *Sparf v. United States*, 156 U.S. 51, 15 S.Ct. 273, 39 L.Ed. 343 (1895), in which the Court explained that even if there is "some evidence bearing upon a particular issue in a cause, but it is so meagre as not, in law, to justify a verdict in favor of the party producing it, the court is in the line of duty when it so declares to the jury." *Id.* at 99-100; *see also Andersen v. United States*, 170 U.S. 481, 496-98 n. 1, 510-11, 18 S.Ct. 689, 692 n. 1, 696-97, 42 L.Ed. 1116 (1898) (holding that evidence did not warrant lesser-included offense instruction, despite the fact that the defendant testified that he killed the deceased out of fear for his life).

Decisions rendered in the century since *Stevenson* dispelled any doubt regarding that case's meaning and the quantum of evidence obliging the court to instruct the jury. Despite any uncertainty in our decisions before it, *Mathews* broke no new ground. The Supreme Court had earlier rejected the argument that any evidence, even a scintilla, warranted a jury instruction on an affirmative defense or lesser-included offense. In *Keeble v. United States*, 412 U.S.

205, 208, 93 S.Ct. 1993, 1995, 36 L.Ed.2d 844 (1973), the Court explained that a court must instruct a jury on a lesser-included offense only "if the evidence would permit a jury rationally to find him guilty of the lesser offense and acquit him of the greater." *See also Schmuck v. United States*, 489 U.S. 705, 716 n. 8, 109 S.Ct. 1443, 1451 n. 8, 103 L.Ed.2d 734 (1989) (reiterating *Keeble* standard); *Beck v. Alabama*, 447 U.S. 625, 635, 100 S.Ct. 2382, 2388, 65 L.Ed.2d 392 (1980) (same); *Patterson v. New York*, 432 U.S. 197, 231 & n. 18, 97 S.Ct. 2319, 2338 & n. 18, 53 L.Ed.2d 281 (1977) (Powell, J., dissenting) (noting that an issue such as self-defense will not be submitted to the jury where the defendant's evidence does not justify a reasonable doubt regarding the issue). *Mathews* followed this consistent line.

In short, it is not enough that an item of evidence viewed alone and unweighed against all the evidence supports an inference that a defendant acted in self defense. *See United States v. Harrison*, 55 F.3d 163, 167 (5th Cir.) (holding that evidence if viewed in isolation warranted lesser-included offense instruction but not if viewed in context of the entire record), *cert. denied*, --- U.S. —, 116 S.Ct. 324, 133 L.Ed.2d 225 (1995). The critical distinction is that a single item of evidence can be overwhelmed by other evidence in the record. *Id.*

The distinction is neither academic nor prissy; it defines the character of appellate review of the criminal trial, reflecting our effort to curb any tendency of criminal appeals to become a lawyer's sporting search for "error." The jury plays a central role at trial, but the threshold to the jury room has never been so low as the dissent would have it. This is

not word play; there is a vast difference in concept between the requirement of sufficient evidence and a scintilla. There is an equally large difference in their application. This difference is central to the dissent, leading it to rely upon snapshots of evidence that lose their image when placed on the dynamic screen of the entire record, as we think they must be. *Cf. United States v. Browner*, 889 F.2d 549, 554-55 (5th Cir. 1989). Few verdicts reached after lengthy trials could survive such an appellate role. In short, a scintilla rule can, in application, turn a criminal trial and the review of a conviction into a sporting contest for lawyers. *Cf. Harrison*, 55 F.3d at 168 (noting that evidence must be sufficient to warrant instruction lest the instruction serve "merely as a device for defendant to invoke the mercy-dispensing prerogative of the jury"). When the contended-for inference becomes an absurdity in light of all the facts adduced at trial, we invade no province of the jury in refusing to pretend it has probative value. *See Sparf*, 156 U.S. at 64-106, 15 S.Ct. at 278-95.

None of this diminishes the role of the jury. This country from the beginning has prized the role of the jury. That rich history has also recognized that trial judges have roles and responsibilities too. *Id.* Of course, our able brother in dissent contends for none of these untoward results. In our view, however, these realities lie behind and are reflected in our insistence that evidence be more than a scintilla, that it be sufficient to create a reasonable doubt that the defendants did not act in self defense.

We hold that the district court was not obligated to give the proposed self-defense instruction and did not err in

the instruction it gave. It is true, as a general proposition, that self-defense and the related defense of another are affirmative defenses to both murder and voluntary manslaughter.[1] However, these general principles must accommodate a citizen's duty to accede to lawful government power and the special protection due federal officials discharging official duties. *See United States v. Feola*, 420 U.S. 671, 679, 95 S.Ct. 1255, 1261, 43 L.Ed.2d 541 (1975). "We do not need citizen avengers who are authorized to respond to unlawful police conduct by gunning down the offending officers." *United States v. Johnson*, 542 F.2d 230, 233 (5th Cir. 1976). Other, non-violent remedies are available. *Id.*

We need not explore the law of self-defense in confrontations between citizens and law enforcement officers to answer the question asked in this case. As we will explain, a reasonable juror could not doubt that the defendants knew their targets were federal agents. Equally, the defendants responded to the agents' lawful force with a deadly barrage of gunfire. Given the extraordinary amount of automatic and large-caliber gunfire that the defendants rained upon persons they knew were federal agents, the law offers no shelter for pleas that the defendant used only force that was "responsive to excessive force." The legal claim simply has no factual leg.

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[1] Self-defense is an affirmative defense on which the defendant bears the initial burden of production. *United States v. Alvarez*, 755 F.2d 830, 842 n. 12 (11th Cir.), *cert. denied*, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235 (1985), *and cert. denied*, 482 U.S. 908, 107 S.Ct. 2489, 96 L.Ed.2d 380 (1987). If and only if the defendant has met his burden of production, the Government bears the burden of persuasion and must negate self-defense beyond a reasonable doubt. *Id.*

That the district court allowed self-defense to the murder charges is nothing about which the defendants can complain. Whether correct or not, we need not decide. That instruction regarding murder seeds no right to a similar plea of self-defense to voluntary manslaughter. Our issue is error, not symmetry.

In sum, the evidence did not require the proposed self-defense instruction. Of course, the defendants may have feared for their life once gunfire erupted, but that fear does not warrant a self-defense instruction. There must be sufficient evidence from which a reasonable juror might infer, at a minimum, either that 1) the defendants did not know the ATF agents' identity, *see United States v. Morton*, 999 F.2d 435, 437-38 (9th Cir. 1993), or that 2) the ATF agents' use of force, viewed from the perspective of a reasonable officer at the scene, was objectively unreasonable under the circumstances. *See United States v. Span*, 970 F.2d 573, 577 (9th Cir. 1992), *cert. denied*, 507 U.S. 921, 113 S.Ct. 1283, 122 L.Ed.2d 676 (1993). That evidence was not adduced at trial.

B.

The record belies the defendants' contention that they did not know the identity of the ATF agents outside the compound on February 28th. In addition to their long preparation for the arrival of law officers, Koresh and the defendants had specific knowledge well in advance that the raid of February 28th was coming. On the morning of the raid, Koresh told the ATF's undercover agent, Roberto

Rodriguez, who briefly visited the Davidians that morning, that "neither the ATF or National Guard will ever get me. They got me once and they'll never get me again." Koresh repeatedly said, "They're coming, Robert. They're coming." Several Davidians overheard Koresh's remarks. Other residents also learned of the impending ATF raid. Craddock, for example, learned that David Jones had heard that seventy-five ATF agents had arrived at the airport and that there might be a raid.

Even if we assume that not every defendant had been forewarned of this specific raid, the record demonstrates beyond doubt that by the time the agents arrived at the compound, defendants knew the agents' identity as federal law enforcement officers. ATF Special Agent Roland Ballesteros, who was one of the first agents to approach the front of the compound after the raid began, testified that as he ran toward the front door of the compound, he saw David Koresh standing in the open front doorway. Ballesteros yelled loudly "Police! Lay down!" and "Search Warrant!" to Koresh several times. Koresh responded by asking "What's going on?" and Ballesteros again yelled "Search Warrant! Lay Down!" As Ballesteros approached the doorway, Koresh "made some kind of smirk" and then closed the door. Ballesteros testified that "there was no doubt in my mind that [Koresh] knew who we were and what we were there for." Other agents also testified that they heard shouts of "Police", "Search Warrant," and "Federal agents" as they exited the cattle trailers and approached the compound.

Even though a reasonable juror could doubt that the Davidians heard the repeated cries of "police" and "search

warrant", a reasonable juror could not overlook the visible indicators of the agents' identity. The Davidians point out that neither the cattle trailers nor the helicopters had government markings on them. However, most of the ATF agents, including the first agents to approach the compound, wore "full raid gear." This gear included military-style helmets and black, bullet-resistant vests. Significantly, the vests had a large, gold ATF badge and the words "ATF" and "Police" inscribed in bright yellow, inch-high letters on their fronts. "ATF" and "Police" were also emblazoned on the back of the vests in large, yellow letters visible at a distance. Some agents wore "baseball" hats with a large yellow badge on the front. These markings were plainly visible in the broad daylight that morning and informed anyone who looked that these were federal law enforcement officials. This was not the garb of unidentified assailants. The notion that this was some alien and unidentified army is beyond the pale.

The defendants point to the testimony of Kathryn Schroeder, a Davidian present in the compound during the raid who later testified on behalf of the Government. She testified that she did not see the ATF markings on the uniforms nor did she hear the agents announce their purpose or identity as they approached the residence.

Schroeder's view of the agents, however, was obstructed by a four-and-a-half foot high, wooden fence in front of her first-floor window. In contrast, the Davidians in the front foyer and on the second floor--the location from which most of the gunfire came--had an unobstructed view of the approaching ATF agents. Schroeder acknowledged

that she assumed that the individuals approaching the compound were government officials. Indeed, Koresh had long taught that the Government--the "beast"--would come. Finally and most importantly, Schroeder's testimony does not suggest that the *defendants* did not know the agents' identity and purpose. That one Davidian, who did not participate in the gun battle, who remained under her bed for the duration of it, and who did not confirm the identity she assumed, says nothing about the knowledge of those armed and participating in the battle. Not even Schroeder will deny that the Davidians knew the agents' identity. *See United States v. Jackson*, 726 F.2d 1466, 1468 (9th Cir. 1984) (noting that witnesses' testimony that they heard no police warning "is not evidence that the officers did not identify themselves").

Viewing the record as a whole and in the light most favorable to the defendants, we are not persuaded that a reasonable jury could harbor a reasonable doubt that the defendants knew the approaching ATF agents' identity. To the contrary, the evidence in the record fits well with other cases affirming the refusal to give a self-defense or knowledge of official identity instruction. *See, e.g., United States v. Streit*, 962 F.2d 894, 898 (9th Cir.) (noting that "record contains ample evidence indicating that the men clearly identified themselves as FBI agents and that Streit was aware of their official status"), *cert. denied*, 506 U.S. 962, 113 S.Ct. 431, 121 L.Ed.2d 352 (1992); *Alvarez*, 755 F.2d at 844-45 & n. 15 (noting that "agents who converged on the motel loudly announced their presence and identity"); *see also United States v. Ochoa*, 526 F.2d 1278, 1282 & nn. 4,5 (5th Cir. 1976) (rejecting the defendant's claim that he did not know the agents' identity where, like here, the

evidence in the record indicated that the agents had announced their identity and wore official raid jackets with insignia visible).

C.

The record also belies the contention that the ATF agents used excessive force. The defendants raise three arguments: First, that the ATF fired the first shots on February 28; second, that regardless of who fired first, the ATF fired indiscriminately into the compound, endangering the lives of women and children; and, third, that excessive force was inherent in the nature of the raid ATF conducted. The evidence in the record does not support any of these claims.

1.

The evidence does not permit any reasonable inference but that the Davidians fired the first shots that morning. Agent after agent testified that the first shots they heard on February 28 came from the compound. In addition to the testimony of the ATF agents, reporters for the local newspaper and television station who witnessed the gunfight testified that the first shots were fired from the compound.

In response to this evidence, the defendants point to three pieces of evidence. First, the Davidians point to a statement given by Agent Ballesteros to the Texas Rangers shortly after the February 28 raid. In that statement,

Ballesteros reported that he assumed that the first shots that he heard came from the ATF "dog team" shooting the Davidians' guard dogs.

At trial, however, Ballesteros testified that he no longer believed his earlier assumption. Rather, he testified that the first shots originated from the compound. Moreover, the evidence at trial contradicted the foundation for his earlier assumption. The "dog team" never shot the dogs in the compound, as it was assigned to do.

Second, the defendants point to the testimony of Jack Zimmermann, but his testimony sheds no light on who fired first. Zimmermann, an attorney for one of the Davidians, visited the compound on April 1, more than a month after the ATF raid. Zimmermann testified that he observed bullet holes in the front door and walls of the compound. In his opinion, the holes had been caused by shots coming from outside the compound. However, Zimmermann acknowledged that he could not tell who fired first. At most, his testimony indicates that gunfire was exchanged.

Third, the defendants rely on a statement that defendant Castillo gave to the Texas Rangers after he exited the compound on April 19. In that statement, Castillo described the scene at the front door of the compound on February 28 as the ATF agents unloaded from the cattle trailers and approached the residence. According to Castillo, Koresh held the front door ajar and said, "Wait a minute, there's women and children in here." Castillo claimed that gunfire immediately erupted through the door from the outside, injuring Koresh.

This self-serving, post-arrest statement, however, is not sufficient to warrant the requested instruction.[2] It stands alone against the uniform and overwhelming testimony of numerous agents and members of the media and, significantly, against the undisputed physical facts. That every ATF agent and member of the media who testified under oath at trial disputed this version of the facts, which Castillo related in an unsworn post-arrest statement, is perhaps powerful enough, but we do not rest there.

Castillo's unsworn observation cannot be squared with undisputed facts. The ATF agents testified that as they approached the residence, they heard gunfire coming from the front of the compound. Agent Ballesteros was one of the first agents out of the cattle trailer that stopped in front of the compound. The agents who followed Ballesteros out of the trailer came under large caliber and automatic gunfire. As Ballesteros ran to his assigned position at the front door, he saw Koresh standing in the foyer holding one of the double front doors open. According to Castillo's post-arrest statement, Koresh announced that there were women and children in the compound; after that announcement, gunfire came through the door and, he "believed," Koresh was hit. At that time, Ballesteros was either at or near the front door. Ballesteros was carrying a shotgun loaded with oo-buckshot at the ready position. If fired, the shotgun blast would have been conspicuous. Its telling signature was absent as

[2] The written report of Castillo's post-arrest statement was not introduced at trial; rather, Gerardo de los Santos, a Texas Ranger, testified regarding Castillo's post-arrest statement. We review Ranger de los Santos' testimony, not the written report.

demonstrated by photographs of the gunbattle at the front of the compound. Rather, Ballesteros, who was hit after Koresh closed the door, took cover in the dog pen next to the front door, where he remained, pinned down, for the duration of the gunbattle. In other words, to accept Castillo's unsworn recollection of events, a reasonable juror would have had to believe either that Ballesteros shot at Koresh at the front door or that some other ATF agent fired through Ballesteros to the front door. Neither version works. Castillo's unsworn recollection is no more than a scintilla of evidence that, when viewed in light of the testimony and evidence in this six-week-long trial, does not support the contested-for inference.

Even if it did, Castillo, the sole defendant capable of claiming the inferential benefit of his post-arrest statement,[3] would be not entitled to the self-defense instruction as a matter of law. It is a necessary precondition to the claim of self-defense that the defendants be free from fault in prompting the ATF's use of force. *Wallace v. United States*, 162 U.S. 466, 472, 16 S.Ct. 859, 861-62, 40 L.Ed. 1039 (1896); *see also Melchior v. Jago*, 723 F.2d 486, 493 (6th Cir. 1983) (noting that under Ohio law, "it is a necessary condition of the right to claim self defense that the accused kill be without fault"), *cert. denied*, 466 U.S. 952, 104 S.Ct. 2156, 80 L.Ed.2d 542 (1984). "One cannot provoke a fight and then rely on a claim of self-defense when that provocation results in a counterattack, unless he has previously withdrawn from the fray and communicated this

[3] There is no evidence that the other defendants claiming error were present at the front door or otherwise shared in Castillo's knowledge.

withdrawal." *Harris v. United States*, 364 F.2d 701 (D.C.Cir. 1966) (per curiam); *see also Andersen*, 170 U.S. at 508, 18 S.Ct. at 696 (noting that self-defense is unavailable where accused "brings on the difficulty for the purpose of killing the deceased, or violation of law on his part is the reason of his expectation of an attack"); *Addington v. United States*, 165 U.S. 184, 187-88, 17 S.Ct. 288, 289-90, 41 L.Ed. 679 (1897) (same); *Gourko v. United States*, 153 U.S. 183, 191, 14 S.Ct. 806, 809, 38 L.Ed. 680 (1894) (same); *Rowe v. United States*, 370 F.2d 240, 241 (D.C.Cir. 1966) (per curiam) (same). Judge Spottswood Robinson explained in *United States v. Peterson*, 483 F.2d 1222 (D.C.Cir. 1973), *cert. denied*, 414 U.S. 1007, 94 S.Ct. 367, 38 L.Ed.2d 244 (1973):

> It has long been accepted that one cannot support a claim of self-defense by a self-generated necessity to kill. The right of homicidal self-defense is granted only to those *free from fault* in the difficulty; it is denied to slayers who incite the fatal attack, encourage the fatal quarrel or otherwise promote the necessitous occasion for taking life. The fact that the deceased struck the first blow, fired the first shot or made the first menacing gesture does not legalize the self-defense claim if in fact the claimant was the actual provoker.

Id. at 1231 (footnotes omitted) (emphasis added).

We need not define precisely the line separating lawful conduct from unlawful provocation to hold that Castillo's conduct falls on the impermissible side of the line.

Although we agree that engaging in unlawful conduct requiring law enforcement officials to investigate does not, by itself, constitute provocation, "an affirmative unlawful act reasonably calculated to produce an affray foreboding injurious or fatal consequences is an aggression which, unless renounced, nullifies the right of homicidal self-defense." *Id.* at 1233 (footnotes omitted).

We are not persuaded that Castillo was entitled to any self-defense instruction even if the events occurred as he related them in his post-arrest statement. In *United States v. Thomas*, 34 F.3d 44, 48 (2d Cir.), *cert. denied*, --- U.S. ---, 115 S.Ct. 527, 130 L.Ed.2d 431 (1994), *and cert. denied*, --- U.S. ---, 115 S.Ct. 683, 130 L.Ed.2d 614 (1994), *and cert. denied*, --- U.S. ---, 115 S.Ct. 774, 130 L.Ed.2d 670 (1995), *and cert. denied*, 115 S.Ct. 1134, 130 L.Ed.2d 1095 (1995), the Second Circuit held that defendants who had been convicted of murder were not entitled to a self-defense instruction where the jury had also convicted the defendants of the attempted robbery of the deceased. The court explained that the defendants' "need to defend themselves arose out of their own armed aggression." *Id.* Similarly, in *Laney v. United States*, 294 F. 412, 413 (D.C.Cir. 1923), the court affirmed the manslaughter conviction of a defendant who successfully fled a race riot but then left his safe haven in search of the rioters. The court explained that "when [the defendant] adjusted his gun and stepped out in the areaway, he had every reason to believe that his presence there would provoke trouble. We think his conduct in adjusting his revolver and going into the areaway was such as to deprive him of any right to invoke the plea of self-defense." *Id.* at 414.

The jury convicted Castillo of using or carrying a firearm during a crime of violence. The predicate crime of violence was conspiracy to murder federal agents. This included stockpiling military-type weapons and preparing for the fight with the "beast". Moreover, according to Castillo's own description of the events in his post-arrest statement, he donned battle dress upon learning of the impending ATF raid. He retrieved his assault rifle and raced to the front door. We are persuaded that Castillo's retrieval of an assault rifle and his preparation for a gunbattle, all occurring as part of the conspiracy to murder federal agents that the jury necessarily found him guilty of as part of its verdict on the 18 U.S.C. § 924(c)(1) weapons charge, deprived Castillo of any claim of self-defense. A member of a conspiracy to murder federal agents, who dresses for combat, retrieves an assault rifle, and proceeds to the front door to confront government agents executing a lawful warrant, is not entitled to claim the benefit of self-defense when the hoped-for confrontation with the agents occurs.

Nor may Castillo claim the benefit of the "imperfect" version of self-defense. Some contend that a defendant who played a role in creating the confrontation that led to a homicide may not escape culpability altogether but may nevertheless reduce his crime from murder to manslaughter. *See* 2 W. LaFave & A. Scott, Substantive Criminal Law § 7.11(a) (1986); *see also Wallace*, 162 U.S. at 472-73. We need not enter this academic debate, however. The trial judge avoided it by giving the self-defense instruction to the murder charge. Castillo was convicted of manslaughter; his failure to be free from fault, at the least, negates his plea of self-defense to the charge of manslaughter.

In short, these pieces of evidence, even when considered together in the light most favorable to the defendants, do not support an inference that the agents fired the first shot. Moreover, even evidence that the ATF agents fired the first shot would not have been sufficient by itself to warrant the self-defense instruction. The ATF agents testified that ATF policy and training directed agents to fire only if they saw an individual threatening the agent's or someone else's life. Initiating gunfire in those circumstances would not be unreasonable. Although the defendants contend that the ATF did not follow its own policy but fired indiscriminately into the compound, that argument proves the point: evidence that the ATF fired first without evidence that such fire was indiscriminate or otherwise excessive does not warrant a self-defense instruction.

2.

The Davidians point out that several ATF agents testified that firing through walls and into windows in which there was no discernable threat would be unreasonable because of the danger to innocents and the possibility for escalation. Seizing on this, the Davidians point to Kathryn Schroeder's testimony that gunfire came through the window in her room at the beginning of the raid. In addition, the Davidians and Whitecliff in particular highlight Marjorie Thomas' video deposition in which she stated that a gunshot shattered the window in her loft on the third floor as she watched the helicopters approach the compound at the beginning of the raid.

This testimony will not support an inference that the ATF agents used excessive force. The pilots of the helicopters all testified that no shots were fired from the helicopters. Significantly, the unchallenged testimony is supported by the physical facts. The helicopters were unarmed, and the doors on the aircraft were closed, thereby preventing agents inside from firing on the compound. Thomas herself acknowledged that she did not know if the bullet that shattered her window came from the helicopter.

Regardless, there was no evidence that any of the *defendants* either came under indiscriminate, unprovoked fire or knew that such fire was taking place. Even if, for example, the National Guard helicopters did fire, the contended-for inference that the four *defendants* acted in self-defense by letting loose a volley of fire upon the ATF agents on the other side of the large compound is untenable.

The dissent's focus upon the testimony of Kathryn Schroeder and Marjorie Thomas forgets that neither is among those convicted of the voluntary manslaughter of federal agents. That Schroeder or Thomas may have been, if charged, entitled to the self-defense instruction does not mean that the four defendants convicted of voluntary manslaughter are so entitled. The question is whether there is sufficient evidence from which a reasonable juror could infer that one of the four defendants, not an uncharged resident present somewhere in the compound, acted in response to excessive force. There are no vicarious defenses.

Our refusal to attribute Schroeder's and Thomas' experiences and knowledge to all the residents of the

compound highlights a fundamental difference between the majority and the dissent in their approach to the evidence. We agree that "each defendant is entitled to individual consideration of the charges against him and his defenses." *See post* at 7. It is also the case, we think, that the knowledge of one resident cannot simply be imputed to all who are at the compound. Defendants need not testify regarding their own knowledge, but there must be sufficient evidence to reasonably infer that the defendants knew of and were responding to excessive force. Here, there was none. Neither Thomas nor Schroeder testified that they told any of the defendants about the gunfire they witnessed. Indeed, Schroeder remained in her room, never relating her experience during the gunfight to others. Nor is there evidence that any defendant could otherwise have had that knowledge in this large, multi-building compound, particularly during the raging gunbattle that the defendants own actions provoked.

3.

Finally, the Davidians argue that excessive force was inherent in the nature of the ATF raid. According to the defendants, sending over seventy well-armed agents to arrest Koresh and execute a search warrant for a residence housing women and children was excessive. We disagree.

The execution of search and arrest warrants necessarily involves some degree of force. *Graham*, 490 U.S. at 396, 109 S.Ct. at 1871-72; *Streit*, 962 F.2d at 899. The ATF had cause to believe that the Davidians had

amassed a large supply of weaponry, including grenades and fully automatic assault rifles. In light of this knowledge and the concern that other methods would endanger the lives of residents of the center, the ATF concluded that a "dynamic entry" raid was the proper method to execute the search and arrest warrants. This evidence will not support an inference of unreasonable force.

Nor is there evidence that the agents possessed an excessive amount of firepower under the circumstances. All of the agents carried 9 millimeter pistols and a limited supply of ammunition. Of the seventy-plus agents participating in the raid, only six agents carried AR-15 semiautomatic rifles capable of shooting rounds that could penetrate a wall. None of the weapons were fully automatic, though some could fire in two-round bursts. Indeed, as events bore out, the ATF possessed too little, not too much, firepower.

Surely, a citizen may not initiate a firefight solely on the ground that the police sent too many well-armed officers to arrest him. The suggestion that a defendant would be entitled to claim self-defense simply by pointing to the police's tactical decision to send twenty heavily-armed officers instead of two lightly-armed ones is untenable. We reject this invitation for individuals to forcibly resist arrest and then put their arresters on trial for the reasonableness of their tactical decisions.

We conclude that the district court did not err in refusing to instruct the jury on self-defense and the defense of another with regard to the voluntary manslaughter charge.

IV.

A.

After several days of deliberations, the jury returned its verdict acquitting all of the Davidians on Count 1 for conspiring to murder federal agents. The jury convicted Avraam, Branch, Castillo, Craddock, and Whitecliff on Count 3 for using or carrying a firearm during and in relation to the crime charged in Count 1. Believing that the two verdicts were inconsistent, the district court summoned the attorneys to the bench before announcing the verdict. The Government suggested sending the jury back for more deliberations to resolve the perceived inconsistency. The defense attorneys opposed that suggestion and asked the court to render a verdict of not guilty on Count 3. Apparently agreeing with the defense, Judge Smith stated that "I don't see anyway [the jury] can correct their mistake except by a finding of not guilty on Count Three." Judge Smith ended the bench conference without announcing a ruling. The jury's verdict was announced. Judge Smith asked whether anyone desired to poll the jury. No attorney responded. Judge Smith discharged the jury.

After the jury had left, Judge Smith announced his intention to issue a written order setting aside the guilty verdict on Count 3:

> The guilty finding as to Count Three will have to be set aside, because, of necessity, the jury could not find a Defendant guilty of that offense without first having found that Defendant guilty of the Conspiracy

> offense alleged in Count One, and the jury found all Defendants not guilty of that offense. So, that portion of the verdict simply cannot stand. There seemed to be no point in asking the jury to retire and reconsider it, because the only decision they could have made was to change that finding to not guilty, so the Court will set that finding aside.

Two days later, the Government moved to reinstate the jury's verdict on Count 3. The Government argued that the jury's decision to acquit the defendants on the predicate offense charged in Count 1 did not require an acquittal on the compound offense charged in Count 3. The Davidians responded, arguing that reinstatement of the jury's verdict would violate their double jeopardy and due process rights. The district court rejected the Davidians' arguments and reinstated the jury's guilty verdict on Count 3 on March 9, 1994.

Judge Smith acknowledged that there was no necessary inconsistency in the jury's verdicts on Counts 1 and 3. *See United States v. Munoz-Fabela*, 896 F.2d 908, 911 (5th Cir.) (noting that "it is only the fact of the offense, and not a conviction, that is needed to establish the required predicate" under § 924(c)), *cert. denied*, 498 U.S. 824, 111 S.Ct. 76, 112 L.Ed.2d 49 (1990); *United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir.) (holding that acquittal on predicate offense does not bar conviction under § 924(c)), *cert. denied*, 510 U.S. 848, 114 S.Ct. 145, 126 L.Ed.2d 107 (1993); *see also United States v. Powell*, 469 U.S. 57, 67-69, 105 S.Ct. 471, 478-79, 83 L.Ed.2d 461 (1984). On appeal, most of the

Davidians appear to accept that much.[4] Rather, the Davidians reurge their double jeopardy and due process arguments.

Regarding double jeopardy, the Davidians claim that the district court's comments at the side-bar conference constituted a pre-verdict judgment of acquittal on Count 3. According to the defendants, reversal of a pre-verdict judgment of acquittal constitutes double jeopardy. We disagree.

The district court did not announce any formal ruling at the side-bar conference before receiving the jury's verdict. To the contrary, he ended the bench conference without comment and ordered the clerk to read the jury's verdict, including the verdict on Count 3. Even one of the defense attorneys inquired after the publication of the verdict "what the Court was going to do" on Count 3. The jury's verdict became final when it was announced in open court and the defendants were given the opportunity to poll the jury. *United States v. White*, 972 F.2d 590, 595 (5th Cir. 1992), *cert. denied*, 507 U.S. 1007, 113 S.Ct. 1651, 123 L.Ed.2d 272 (1993), *and cert. denied*, 507 U.S. 1007, 113 S.Ct. 1651, 123 L.Ed.2d 272 (1993).

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[4] Avraam and Castillo separately contend that we should revisit our decisions in *Munoz-Fabela* and its progeny. We are bound by those decisions, however. *See Burlington Northern Railroad Co. v. Brotherhood of Maintenance of Way Employees*, 961 F.2d 86, 89 (5th Cir.1992), *cert. denied*, 506 U.S. 1071, 113 S.Ct. 1028, 122 L.Ed.2d 173 (1993).

Even were we to construe the comments at the bench conference as a formal ruling setting aside the jury's verdict on Count 3, it would not be a judgment of acquittal. "[A] defendant is acquitted only when 'the ruling of the judge, whatever its label, actually represents a resolution [in the defendant's favor], correct or not, of some or all of the factual elements of the offense charged.'" *United States v. Scott*, 437 U.S. 82, 97, 98 S.Ct. 2187, 2197, 57 L.Ed.2d 65 (1978) (quoting *United States v. Martin Linen Supply Co.*, 430 U.S. 564, 571, 97 S.Ct. 1349, 1355, 51 L.Ed.2d 642 (1977)). That the district court rendered a decision in favor of the defendants prior to the publication of the jury's verdict does not bar the Government from seeking to overturn that decision, either at the district court or on appeal, unless the decision rests on a determination that the Government's evidence is legally insufficient to sustain a conviction. *Scott*, 437 U.S. at 97, 100, 98 S.Ct. 2197, 2198.

The record is clear that Judge Smith did not direct his comments at the bench conference to the sufficiency of the evidence on Count 3. Rather, he shared with counsel a misapprehension regarding the validity of inconsistent jury verdicts. The record establishes that it is *solely* that misapprehension, understandable in that tension-filled moment, and not any doubt regarding the sufficiency of the evidence that led Judge Smith to set aside the jury's verdict.

The district court's post-verdict decision to set aside the jury's verdict gives defendants no comfort. The Fifth Amendment does not bar the government from appealing post-verdict judgments of acquittal. *United States v. Boyd*, 566 F.2d 929, 932 (5th Cir. 1978); *Government of the Virgin*

Islands v. Christensen, 673 F.2d 713, 718-19 (3d Cir. 1982). *A fortiori*, the district court's own reinstatement of a final jury verdict of guilt--or, stated another way, the district court's decision to reverse its earlier decision--does not twice put defendants in jeopardy. *United States v. LaSpesa*, 956 F.2d 1027, 1034 (11th Cir. 1992).

The Davidians also claim that reinstating the guilty verdict denied them due process. The Davidians argue that they relied on the Judge's comments at the bench conference suggesting that he agreed that the guilty verdict on Count 3 had to be set aside and did not ask Judge Smith to instruct the jury to render a directed verdict of not guilty on Count 3 or, alternatively, to order the jury to resume deliberations to resolve the inconsistent verdicts. In essence, the Davidians contend that they were "sandbagged" by the district court.

Neither the Constitution nor general principles of federal criminal law require a district court, when confronted with inconsistent jury verdicts, to instruct the jury to return a verdict of not guilty on all counts. In *Harris v. Rivera*, 454 U.S. 339, 348, 102 S.Ct. 460, 465-66, 70 L.Ed.2d 530 (1981), the Supreme Court rejected a due process challenge to a conviction based on an inconsistent verdict. "Inconsistency in a verdict is not a sufficient reason for setting it aside." *Id.* at 345. What *Harris* established as a matter of constitutional law, *United States v. Powell*, 469 U.S. 57, 65, 105 S.Ct. 471- 476-77, 83 L.Ed.2d 461 (1984), reaffirmed as a matter of federal criminal law. In short, the district court was under no duty, constitutional or otherwise, to instruct the jury to return a verdict of not guilty on Count 3. To the contrary, *Powell* precluded that option.

Similarly, the district court was not obligated to return the jury for further deliberations, to resolve the inconsistent verdicts. *Powell* may mandate, and certainly points the district court to accept inconsistent verdicts. 469 U.S. at 69, 105 S.Ct. at 4790. As a practical matter, pushing a jury to continue its work when it has a final verdict risks other difficulties. *See United States v. Straach*, 987 F.2d 232, 242-43 (5th Cir. 1993) (noting that "a judge errs in instructing the jury to deliberate further if the jury has reached a final verdict"); *White*, 972 F.2d at 594-95 (same).

Even if the Davidians were "due" this option, the district court did not deprive them of it. At the bench conference, the Government recommended that the jury be sent back to continue deliberating, but defense counsel adamantly opposed that suggestion.

Castillo separately contends that the district court's reinstatement of the jury's guilty verdict on Count 3 deprived the Davidians of the opportunity to poll the jury. Rule 31(d) of the Federal Rules of Criminal Procedure provides that, before the verdict is recorded, "the jury shall be polled at the request of any party or upon the court's own motion." A defendant can waive his right to a jury poll by failing to request the court to poll the jury. *United States v Beldin*, 737 F.2d 450, 455 (5th Cir.), *cert. denied*, 469 U.S. 1075, 105 S.Ct. 572, 83 L.Ed.2d 512 (1984).

The Davidians waived their right to have the jury polled by failing to make a timely request. After the clerk read the jury's verdict, Judge Smith asked whether anyone desired that the jury be polled, and seeing no response,

remarked, "I take it not." He then discharged the jury. That the Davidians misapprehended the need to poll the jury on Count 3 due to their mistaken belief that Judge Smith had set aside the guilty verdict does not excuse their failure to request the poll. Indeed, even after the Government moved to reinstate the jury's verdict on Count 3, the Davidians did not specifically complain that reinstatement would violate their right to have the jury polled.

Finally, Craddock separately contends that the district court's reinstatement of the jury's verdict violates his Sixth Amendment right to counsel because his attorney was not called to participate in the bench conference after the jury returned with its verdict.

The Sixth Amendment entitles the defendant to the assistance of counsel at all "critical stages" of a criminal proceeding. *Tucker v. Day*, 969 F.2d 155, 159 (5th Cir. 1992). The pre-verdict bench conference was not a critical stage of the Davidians' trial, however. The district court rendered no decision regarding the inconsistent verdicts at the bench conference. To the contrary, the bench conference was a brief, "informational meeting" at which the district court informally advised counsel of the jury's verdict and at which no prejudicial action was taken. *Cf. People v. Hardy*, 2 Cal.4th 86, 5 Cal.Rptr.2d 796, 864, 825 P.2d 781, 849, *cert. denied*, 506 U.S. 987, 113 S.Ct. 498, 121 L.Ed.2d 435 (1992), *and cert. denied*, 506 U.S. 1056, 113 S.Ct. 987, 122 L.Ed.2d 139 (1993); *Roker v. State*, 262 Ga. 220, 416 S.E.2d 281, 283 (1992). After the jury's verdict was announced, Craddock's counsel had the opportunity to poll the jury, to address the district court regarding the inconsistent verdicts,

and, eventually, to respond to the Government's motion to reinstate the jury's verdict. We are not persuaded that the district court's failure to call Craddock's counsel to the pre-verdict bench conference violated Craddock's Sixth Amendment right to counsel.

In short, the district court's decision to reinstate the jury's guilty verdict on Count 3 was correct.

B.

The district court sua sponte ordered the use of an anonymous jury. Whitecliff, along with Avraam and Branch, objected to the court's order, claiming that the use of an anonymous jury violated their right to a fair trial before an impartial jury. Fatta approved the anonymous jury.

On appeal, Whitecliff argues that the use of an anonymous jury hindered the selection of an impartial jury and led jurors to believe that defendants posed some threat of harm to them, thereby undermining the presumption of innocence. Pointing out that most cases upholding the use of anonymous juries have involved organized crime or violent drug syndicates threatening to disrupt the judicial process, the Davidians argue that, to justify an anonymous jury, it is "crucial" that there be evidence that the defendants or their associates pose some threat to the judicial process and that there was no evidence that any of the defendants or individuals associated with them was a threat to the jury.

Referring to the jury as "anonymous" is misleading. Anonymity has long been an important element of our jury system. Jurors are randomly summoned from the community at large to decide the single case before them and, once done, to "inconspicuously fade back into the community." *United States v. Scarfo*, 850 F.2d 1015, 1023 (3d Cir.), *cert. denied*, 488 U.S. 910, 109 S.Ct. 263, 102 L.Ed.2d 251 (1988); *see also* 3 William Blackstone, Commentaries *378. "Anonymous jury" has come to mean something different in recent years, signaling the district court's decision to withhold certain biographical information about potential jurors from the parties involved. That said, we should be wary of painting with too broad a brush. "Anonymous" juries include those about whom more has been concealed than here. *See, e.g., United States v. Ross*, 33 F.3d 1507, 1519 (11th Cir. 1994) (withholding names, addresses, places of employment, and spouses' names and places of employment), *cert. denied*, --- U.S. ---, 115 S.Ct. 2558, 132 L.Ed.2d 812 (1995). The jurors here were not "anonymous" except in the most literal sense. The district court ordered only the jurors' names and addresses be withheld from the parties. Otherwise, the court provided the defendants with a wealth of information about the venire, including occupations and names of employers.

The decision to withhold biographical information about the jurors from the parties in a criminal prosecution is weighty, its validity turning on the individual, fact-specific circumstances of each case. Deciding to withhold even the name and address of a member of the venire "require[s] a trial court to make a sensitive appraisal of the climate surrounding a trial and a prediction as to the potential

security or publicity problems that may arise during the proceedings." *United States v. Childress*, 58 F.3d 693, 702 (D.C.Cir. 1995), *cert. denied*, --- U.S. ---, 116 S.Ct. 825, 133 L.Ed.2d 768 (1996). Accordingly, we review such a district court decision for abuse of discretion. *United States v. Krout*, 66 F.3d 1420, 1426 (5th Cir. 1995), *cert. denied*, --- U.S. ---, 116 S.Ct. 963, 133 L.Ed.2d 884 (1996), *and cert. denied*, --- U.S. ---, 116 S.Ct. 963, 133 L.Ed.2d 884 (1996).

"'[T]he use of an anonymous jury is constitutional when, there is strong reason to believe the jury needs protection and the district court takes reasonable precautions to minimize any prejudicial effects on the defendant and to ensure that his fundamental rights are protected.'" *Id.* at 1427 (quoting *United States v. Wong*, 40 F.3d 1347, 1376 (2d Cir. 1994)) (internal quotation marks omitted). We have listed some of the usual considerations:

> (1) the defendants' involvement in organized crime; (2) the defendants' participation in a group with the capacity to harm jurors; (3) the defendants' past attempts to interfere with the judicial process or witnesses; (4) the potential that, if convicted, the defendants will suffer a lengthy incarceration and substantial monetary penalties; and, (5) extensive publicity that could enhance the possibility that jurors' names would become public and expose them to intimidation and harassment.

Id. (citations omitted).

We did not suggest, however, that these or some aggregate must be established on pain of reversal. Rather, these are concerns commonly present in cases, such as *Krout*, where courts have upheld the use of an anonymous jury. Other circumstances may also justify its use. Indeed, while evidence that the defendant has in the past or intends in the future to tamper with the jury may be sufficient to warrant an anonymous jury, it is by no means necessary. *United States v. Edmond*, 52 F.3d 1080, 1091 (D.C.Cir.), *cert. denied*, --- U.S. ---, 116 S.Ct. 539, 133 L.Ed.2d 443 (1995), *and cert. denied*, --- U.S. ---, 116 S.Ct. 539, 133 L.Ed.2d 443 (1995). District courts should look to the "totality of the circumstances." *Ross*, 33 F.3d at 1521 n. 26.

The district court reasoned that an anonymous jury was appropriate because of the "enormous amount of world-wide media attention" generated by the case and the emotionally charged atmosphere surrounding it. Not all celebrated trials merit an anonymous jury, but "[t]he prospect of publicity militates in favor of jury anonymity to prevent exposure of the jurors to intimidation or harassment." *United States v. Wong*, 40 F.3d 1347, 1377 (2d Cir. 1994), *cert. denied*, — U.S. ---, 115 S.Ct. 1968, 131 L.Ed.2d 858 (1995), *and cert. denied*, --- U.S. ---, 115 S.Ct. 1968, 131 L.Ed.2d 858 (1995), *and cert. denied*, — U.S. ---, 115 S.Ct. 2568, 132 L.Ed.2d 830 (1995), *and cert. denied*, --- U.S. ---, 116 S.Ct. 190, 133 L.Ed.2d 127 (1995); *United States v. Vario*, 943 F.2d 236, 240 (2d Cir. 1991), *cert. denied*, 502 U.S. 1036, 112 S.Ct. 882, 116 L.Ed.2d 786 (1992). It is not just the media attention. This trial aroused deep passions. The district court feared the potentially disruptive effects of such public attention on the trial in general and the jurors in

particular. That several jurors received mail regarding the case during the trial only confirmed the concern of the district court. *Cf. United States v. Sanchez*, 74 F.3d 562, 565 (5th Cir. 1996) (rejecting anonymous jury where "there was no indication that the jurors in this case would be subjected to the type of extensive publicity that might bring about intimidation and harassment"). The court was also concerned that persons bent on mischief might confuse the Davidian jurors with jurors in a high-profile trial involving organized crime figures occurring at the same time in the same courthouse. These concerns justified the district court's decision to use an anonymous jury.

Significantly, there is no showing that refusing to release the names and addresses of the jury prejudiced the defendants' ability to select an impartial jury. The court furnished the defendants with answers to 80 detailed questions submitted by the district court to prospective jurors. No defendant argues to us that the information obtained from these questionnaires was deficient. *See Childress*, 58 F.3d at 704 (upholding anonymous jury where "court conducted a searching voir dire and gave jurors an extensive questionnaire, the scope of which appellants do not challenge").

We also emphasize that at voir dire, the court asked the defendants' proposed questions and elicited additional information regarding potential juror bias. *See Wong*, 40 F.3d at 1377 (upholding anonymous jury where "extensive" voir dire adequately explored prospective juror bias). In short, the contention that the use of the anonymous jury hindered the Davidians' ability to select an impartial jury

sorely underestimates the ability of counsel to use the available "arsenal of information" about each prospective juror. *United States v. Barnes*, 604 F.2d 121, 142 (2d Cir. 1979), *cert. denied*, 446 U.S. 907, 100 S.Ct. 1833, 64 L.Ed.2d 260 (1980).

Similarly, the use of an anonymous jury did not undermine the defendants' presumption of innocence. At heart, the Davidians' argument rests on a speculative inference that the jurors were more likely to render a guilty verdict because of their belief that the defendants were dangerous. Such speculation is unwarranted. Indeed, it may be that "[a] juror who fears a defendant's retaliation might be more apt to return a guilty verdict despite such fears rather than because of them." *Scarfo*, 850 F.2d at 1026.

In any event, the district court instructed the jury regarding the non-defendant-related need for anonymity and the presumption of innocence. Moreover, at voir dire, Judge Smith explained his decision to use an anonymous jury because of the public attention surrounding the case and the fear that the jury would be confused with the jury in the organized crime case being conducted at the same time down the hall. Judge Smith then cautioned:

> Now, that's why we're doing this. But I need to make certain that's not--that's not going to have any negative impact in your minds towards the Defendants. I have no indication whatsoever that any of these Defendants or their families or friends would be any threat to any juror selected in this case, and I want to be sure you fully understand that.

Judge Smith asked whether anyone had "negative feelings" toward the defendants because of the use of an anonymous jury. No one responded. In addition, Judge Smith instructed the jury on the presumption of innocence both at voir dire and in the final charge. These cautionary instructions, which compare favorably to those used in other cases in which the use of an anonymous jury has been upheld, ensured that the defendants' presumption of innocence was not compromised. *See United States v. Riggio*, 70 F.3d 336, 340 & n. 23 (5th Cir. 1995) (upholding use of anonymous jury where the district court "took effective steps to minimize any prejudicial effects associated with an anonymous jury"), *cert. denied* --- U.S. ---, 116 S.Ct. 1366, 134 L.Ed.2d 531 (1996); *United States v. Darden*, 70 F.3d 1507, 1533 (8th Cir. 1995) (same), *cert. denied*, --- U.S. ---, 116 S.Ct. 1449, 134 L.Ed.2d 569 (1996); *cert. denied*, --- U.S. ---, 116 S.Ct. 2567, --- L.Ed.2d --- (1996); *Edmond*, 52 F.3d at 1093; *United States v. Thomas*, 757 F.2d 1359, 1364-65 & n. 1 (2d Cir.), *cert. denied*, 479 U.S. 819, 106 S.Ct. 66, 88 L.Ed.2d 54 (1985), *and cert. denied*, 474 U.S. 819, 106 S.Ct. 67, 88 L.Ed.2d 54 (1985), *and cert. denied*, 479 U.S. 818 (1986); *United States v. Tutino*, 883 F.2d 1125, 1133 (2d Cir. 1989), *cert. denied*, 493 U.S. 1081, 110 S.Ct. 1139, 107 L.Ed.2d 1044 (1990), *and cert. denied*, 493 U.S. 1082, 110 S.Ct. 1139, 107 L.Ed.2d 1044 (1990).

We conclude that the decision to not disclose the names and addresses of the jurors did not violate the Davidians' constitutional rights to a fair trial before an impartial jury. To the contrary, the district court's decision reflected great care.

C.

On April 19, 1993, the Texas Rangers arrested Castillo after he fled the blazing compound. Later that day, Castillo gave a statement to Texas Ranger Gerardo de los Santos, who prepared a written report of the interview.

During the trial, the Government moved for an order precluding Castillo from offering into evidence exculpatory statements in the report. The Government argued that such statements were inadmissible hearsay. Anticipating Castillo's response to the motion, the Government also argued that Rule 106 of the Federal Rules of Evidence did not require their admission if the Government introduced other, inculpatory statements in the report. The district court granted the Government's motion in part.

At trial, the Government called Ranger de los Santos to testify regarding certain portions of Castillo's post-arrest statement, particularly those concerning the events on February 28, the day of the ATF raid. The actual report was not introduced into evidence. During the direct examination of Ranger de los Santos, the district court denied Castillo's attempt to introduce the following underlined, exculpatory statements contained in the Ranger's report of the post-arrest interview:

> 7. The following was ascertained from Castillo reference his knowledge and participation reference the initial raid by ATF on 02-28-93:

A. That on Sunday, 02-28-93, in the early morning hours, CASTILLO woke up, got dressed in camouflage style clothes, and went outside to work on the concrete slab being built over the bunker that is supposed to be a tornado shelter. After going outside, CASTILLO stated that it was too cold, and he decided to go back in and go to bed.

B. CASTILLO stated that after he laid down, he heard someone say that something was going to happen. CASTILLO got up and got dressed again. This time he dressed in a black shirt and black pants. CASTILLO commented, "I looked like the ATF." CASTILLO also put on a vest that was capable of holding eight (8) ammunition magazines of an AR-15 that he was given before 02-28-93.

C. CASTILLO doesn't remember the exact time, but stated he looked out the window of his room facing the front area of the compound and saw two (2) cattle trucks driving up to the compound. CASTILLO identified his room as being the third room facing the front from the entrance door.

D. After seeing the cattle trucks, CASTILLO went out into the hallway and saw Vernon HOWELL. He told HOWELL what he had seen and accompanied HOWELL to the front

door. CASTILLO was carrying an AR-15 rifle. That HOWELL was wearing regular clothes and unarmed.

E. CASTILLO stated that when they got to the front door, HOWELL opened the door and yelled out, "Wait a minute. There's women and children in here." Then all of a sudden shots were fired at the front door where he believes HOWELL was shot. At this time CASTILLO stated he tried to chamber a round in his rifle, but that it jammed. That Perry JONES was also in the foyer unarmed and several other men that CASTILLO states he can't remember who they were, nor if they were armed or not.

F. After his rifle failed, CASTILLO states that he ran down the hallway and back into his room where he picked up his own 9mm Beretta handgun. CASTILLO then ran out, continuing down the hallway toward the other end of the compound, and went into a room that is located second to the last on the west side of the compound facing the front of the compound.

G. As CASTILLO was about to enter said room, he looked into the room located directly across and observed "Winston" laying on the floor dead with a gunshot wound to the head.

H. CASTILLO went into the room identified as McBEAN, SUMMERS, and HIPSMAN'S room. CASTILLO stated he took cover during the shooting, never firing a shot. CASTILLO also stated no one in his room fired a round. CASTILLO claims that he doesn't know who fired a weapon inside.

I. That after a while, CASTILLO heard someone running down the hallway yelling cease fire. According to CASTILLO, this person sounded like Brad BRANCH.

J. After the cease fire, CASTILLO went to the kitchen area and picked up an AK-47 rifle that was laying on a table. CASTILLO observed Adebowado "DaBo" DAVIES in the kitchen area armed with an AR-15 rifle. CASTILLO looked out the kitchen door facing the pool and observed a wounded ATF Agent on the chapel roof. He then observed four ATF Agents, 3 men and 1 black female approach to remove another agent. CASTILLO stated that he never aimed his rifle at these agents.

K. CASTILLO stated that he doesn't remember anything else after this date. CASTILLO did state that during the standoff he was assigned guard duty at the chapel along with "DaBo." CASTILLO'S shift was from 6:00 P.M. to 12:00 midnight during

these days. CASTILLO was requested to give a written statement, but stated he would think about it.

8. According to CASTILLO, he was given the AR-15 weeks prior to 02-28-93, along with three (3) or four (4) magazine clips and ammunition. CASTILLO doesn't remember who gave him the rifle.

* * * * * *

10. CASTILLO states that he heard that Winstom, HIPSMAN, Peter GENT, Perry JONES, and Jaydean WENDEL had been killed. That WENDEL was asleep in bed when she was shot. That GENT had been killed by the helicopters and JONES had been shot in the legs and stomach. That the dead had been taken to the bunker area because they started to smell bad. That he didn't participate in the removal or burial of the dead.

11. CASTILLO states that he never received firearms training by anybody, but did shoot his weapons a couple of times in the past. That he fired his weapons only a couple of times into bales of hay in the gym area and assumes the women also did this.

12. CASTILLO states that there was a lot of ammo kept in the compound and he

personally observed one or two grenades at one time.

* * * * * *

16. In reference to the undercover ATF Agents that moved in across the compound, CASTILLO claims that they knew they were agents because they were too old to be students and drove expensive vehicles.

17. CASTILLO'S duties at the compound were to help construct the tornado shelter, play drums, and study the Bible.

We review the district court's decision for abuse of discretion. *United States v. Abroms*, 947 F.2d 1241, 1250 (5th Cir. 1991), *cert. denied*, 505 U.S. 1204, 112 S.Ct. 2992, 120 L.Ed.2d 869 (1992). Rule 106 provides:

> When a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it.

Fed.R.Evid. 106. This rule partially codifies the common-law "rule of completeness." *Beech Aircraft Corp. v. Rainey*, 488 U.S. 153, 172, 109 S.Ct. 439, 451, 102 L.Ed.2d 445 (1988). Its purpose is "to permit the contemporaneous introduction of recorded statements that place in context

other writings admitted into evidence which, viewed alone, may be misleading." *United States v. Jamar*, 561 F.2d 1103, 1108 (4th Cir. 1977).

The Government first argues that Rule 106 does not apply to Castillo's post-arrest statement. Noting that the rule by its terms only applies to "a writing or recorded statement", the Government points out that Ranger de los Santos' report of Castillo's post-arrest statement was not introduced into evidence. Rather, Ranger Santos testified based on his own recollection of the post-arrest interview.

The advisory committee's note to Rule 106 distinguishes between writings and recorded statements, on the one hand, and conversations, on the other. *See* Fed.R.Evid. 106 advisory committee's note (noting that rule "does not apply to conversations"). Other circuits have held that Rule 106 does not apply to testimony regarding conversations, *see United States v. Haddad*, 10 F.3d 1252, 1258 (7th Cir. 1993); *United States v. Castro*, 813 F.2d 571, 576 (2d Cir.), *cert. denied*, 484 U.S. 844, 108 S.Ct. 137, 98 L.Ed.2d 94 (1987), though they have held that Rule 611(a) imposes an obligation for conversations similar to what Rule 106 does for writings. *Haddad*, 10 F.3d at 1258; *Castro*, 813 F.2d at 576.

Assuming but not deciding that the government used the recorded statement at trial in a manner that brought it under Rule 106, we agree with the Government that Rule 106 does not require the admission of the excluded portions of Castillo's post-arrest statement. Although different circuits have elaborated Rule 106's "fairness" standard in different

ways, *compare United States v. Li*, 55 F.3d 325, 329 (7th Cir. 1995) *with Marin*, 669 F.2d at 84, common to all is the requirement that the omitted portion be relevant and "necessary to qualify, explain, or place into context the portion already introduced." *United States v. Pendas-Martinez*, 845 F.2d 938, 944 (11th Cir. 1988); *United States v. Crosby*, 713 F.2d 1066, 1074 (5th Cir.), *cert. denied*, 464 U.S. 1001, 104 S.Ct. 506, 78 L.Ed.2d 696 (1983). Castillo has failed to show how any of the five, excluded portions of his post-arrest statement qualify, explain, or place into context other portions about which Ranger de los Santos testified. We address each excluded statement in turn.

Castillo first argues that the district court improperly excluded paragraph 7G of Ranger de los Santos' report: "As CASTILLO was about to enter said room, he looked into the room located directly across and observed 'Winston' laying on the floor dead with a gunshot wound to the head." According to Castillo, this statement explains why later, after the cease-fire had been declared, he went to the kitchen and picked up an AK-47. The district court excluded the statement as irrelevant to any of the issues in the trial.

While we think that the excluded portion was relevant, we are not persuaded that it was necessary to qualify, explain, or place into context Castillo's statement regarding his actions after the cease-fire had been declared. The excluded portion referred to events that occurred in the opening moments of the gun battle on February 28. The cease-fire was declared several hours later. We find no abuse of discretion in the trial court's judgment calls regarding completeness and context.

Castillo next challenges the district court's exclusion of paragraph 7H: "CASTILLO went into the room identified as McBEAN, SUMMERS, and HIPSMAN'S room. CASTILLO stated he took cover during the shooting, never firing a shot. CASTILLO also stated no one in his room fired a round. CASTILLO claims that he doesn't know who fired a weapon inside." According to Castillo, this statement corrects the impression that he fired a gun that day, an impression allegedly created by his earlier statement that he returned to his room and picked up his own 9mm Beretta handgun. The district court excluded the statement as "a self-serving inculpatory [sic] statement that does not contradict, explain, or qualify the rest of the statement." We find no abuse of discretion.

Ranger de los Santos testified that Castillo said that he went to his room, picked up his 9mm Beretta handgun, and ran down the hall to another room. The cold fact that he went into his room and picked up his handgun remains unqualified and unexplained. We do not doubt the exculpatory nature of the excluded statement, but that does not require its admission under Rule 106. *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.), *cert. denied*, 479 U.S. 938, 107 S.Ct. 419, 93 L.Ed.2d 370 (1986).

Castillo next contests the district court's exclusion of paragraph 10:

> CASTILLO states that he heard that Winstom, HIPSMAN, Peter GENT, Perry JONES, and Jaydean WENDEL had been killed. That WENDEL was asleep in bed when she was shot. That GENT had

> been killed by the helicopters and JONES had been shot in the legs and stomach. That the dead had been taken to the bunker area because they started to smell bad. That he didn't participate in the removal or burial of the dead.

According to Castillo, this statement explains why he stood guard in the chapel after February 28. The district court excluded that statement as "inadmissible hearsay that does not qualify or explain the subject matter of the portion offered by the Government." We find no abuse of discretion.

Excluding Castillo's statement about his learning of the deaths of other Davidians did not mislead the jury about Castillo's admission that he had stood guard in the chapel area after February 28. The excluded statement did not tie Castillo's learning of the deaths of the other Davidians and his decision to stand guard after the 28th. The statement does not specify when Castillo learned of the deaths. From the Ranger's report, it appears that Castillo learned of the deaths *after* he began guard duty.

Castillo next challenges the exclusion of the first sentence of paragraph 11: "CASTILLO states that he never received firearms training by anybody, but did shoot his weapons a couple of times in the past." According to Castillo, this statement was erroneously excluded, while testimony regarding the remainder of paragraph 11 and all of paragraph 12 was admitted. In its amended order, the district court ruled that the statement was excludable as inadmissible hearsay that does not qualify or explain the remainder of paragraph 11.

We do not reach the merits of the district court's ruling. At trial, Ranger de los Santos did not testify about Castillo's statement, contained in paragraph 11, that he had fired his weapons only a couple of times into bales of hay. Therefore, there was no prejudicial omission for Rule 106 to correct.

Finally, Castillo challenges the exclusion of paragraph 17: "CASTILLO'S duties at the compound were to help construct the tornado shelter, play drums, and study the Bible." According to Castillo, this statement counters the impression that Castillo was part of a conspiracy to murder federal agents. The district court excluded the statement as irrelevant and as inadmissible hearsay that does not clarify or explain any other statement. We agree on both counts. Castillo fails to explain how any of Ranger de los Santos' testimony misled the jury and required the admission of paragraph 17.

In short, the district court did not abuse its discretion in refusing to admit these portions of Castillo's post-arrest statement pursuant to Rule 106. We acknowledge the danger inherent in the selective admission of post-arrest statements. *United States v. Walker*, 652 F.2d 708, 713 (7th Cir. 1981). Neither the Constitution nor Rule 106, however, requires the admission of the entire statement once any portion is admitted in a criminal prosecution. *See United States v. Mulligan*, 573 F.2d 775, 778 (2d Cir.) (rejecting all-or-nothing approach), *cert. denied*, 439 U.S. 827, 99 S.Ct. 99, 58 L.Ed.2d 120 (1978). We do no violence to criminal defendants' constitutional rights by applying Rule 106 as written and requiring that a defendant demonstrate with

particularity the unfairness in the selective admission of his post-arrest statement. *See* 21 Charles Alan Wright & Kenneth W. Grahm Jr., Federal Practice and Procedure: Evidence § 5077 at 370. This, Castillo failed to do.

V.

Each Davidian contests the sufficiency of the evidence to support his conviction on the various counts. We review the evidence in the record in the light most favorable to the Government and draw all reasonable inferences in favor of the jury's verdict. *United States v. Ruggiero*, 56 F.3d 647, 654 (5th Cir.), *cert. denied*, --- U.S. ---, 116 S.Ct. 397, 133 L.Ed.2d 317 (1995), *and cert. denied*, --- U.S. ---, 116 S.Ct. 486, 133 L.Ed.2d 413 (1995). Our review is limited to the determination whether a reasonable trier of fact could find the evidence established the defendant's guilt beyond a reasonable doubt. *United States v. Jaramillo*, 42 F.3d 920, 922-23 (5th Cir.), *cert. denied*, --- U.S. ---, 115 S.Ct. 2014, 131 L.Ed.2d 1013 (1995). We address the convictions on each count in turn.

A.

The jury convicted Avraam, Branch, Castillo, and Whitecliff of aiding and abetting the voluntary manslaughter of federal agents in violation of 18 U.S.C. §§ 2, 1112. Significantly, the Davidians do not contest the sufficiency of the evidence establishing that the four ATF agents were killed by gunfire coming from inside the compound. Rather,

the Davidians challenge the sufficiency of the evidence that each of them aided and abetted that killing. The gravamen of the defendants' argument is that the Government failed to prove that they participated in the gunbattle or assisted those who killed the four ATF agents on February 28. We disagree.

The Government must prove that each defendant 1) associated with the criminal venture, 2) participated in the venture, and 3) sought by action to make the venture succeed. *Nye & Nissen v. United States*, 336 U.S. 613, 619, 69 S.Ct. 766, 770, 93 L.Ed. 919 (1949); *United States v. Menesses*, 962 F.2d 420, 427 (5th Cir. 1992). "To aid and abet simply means to assist the perpetrator of a crime while sharing the requisite criminal intent." *Jaramillo*, 42 F.3d at 923. We have cautioned, however, that "mere presence and association alone are insufficient to sustain a conviction for aiding and abetting." *United States v. Martiarena*, 955 F.2d 363, 366-67 (5th Cir. 1992).

Renos Avraam

Two witnesses testified regarding Avraam's activity on February 28. Kathryn Schroeder, a Davidian, testified on behalf of the Government as part of a plea bargain. Several days after the ATF raid, she spoke with Avraam regarding his actions on February 28. He said that he had fired his weapon that morning. She also testified that when she distributed ammunition to the Davidians standing guard after the raid, Avraam told her that he had a .50 caliber rifle with ammunition in the gymnasium near the rear of the

compound. She did not see the rifle, but another Davidian confirmed that Avraam had the gun.

Bradley Rogans, Avraam's cellmate in the Coryell County jail after his arrest, testified that he spoke with Avraam regarding the events at Mount Carmel on February 28. Avraam told Rogans that he had hid behind a safe during the gunbattle. When Rogans asked whether he had shot at the agents, Avraam responded that he had not. Avraam then laughed, however, and added, "Well, I'm not a bad shot." In addition, Avraam told Rogans that he had a fully automatic gun while he was at the compound.

Avraam admitted to Schroeder that he had fired his weapon during the gunbattle, and Avraam's tongue-and-cheek statement to Rogans that he was a "good shot" lent credence to this testimony. Moreover, numerous ATF agents testified that they heard .50 caliber gunfire during the raid. There were only two .50 caliber rifles owned by the Davidians. Schroeder's testimony linked one of the two to Avraam. Based on this evidence, a reasonable jury could find that Avraam aided and abetted the voluntary manslaughter of the federal agents.

Brad Branch

All three Davidians who were present at the compound on February 28 and who testified at trial witnessed Branch participating in the gunbattle that morning. Victorine Hollingsworth was near her room on the second floor of the compound when gunfire erupted. Early into the gunbattle, she saw Branch on the second floor armed with a rifle.

According to Hollingsworth, he ran from room to room, firing in each. At one point, she overheard Branch, who was in a room facing the front of the compound where the ATF agents were, exclaim, "He nearly got me and I got one."

Marjorie Thomas confirmed Hollingsworth's account. Thomas saw Branch with a gun on the second floor moving from room to room. After the gunbattle, Thomas guarded the chapel with Branch, Whitecliff, and another Davidian. At one point, she overheard Branch tell the others that he had shot someone on the outside during the ATF raid. In addition, Kathryn Schroeder, who remained in her room on the first floor at the front of the compound during the gunbattle, testified that she heard Branch "yelling, running around the hallways, very hyper." Based on this evidence, a reasonable jury could find that Branch actively participated in the gunbattle on February 28.

Jaime Castillo

The most incriminating evidence against Castillo came from Castillo himself. According to his own post-arrest statement, Castillo awoke very early in the morning on February 28. He got dressed in camouflage clothing and went outside to begin working on the underground bunker the Davidians were constructing. The cold morning air prompted him to return to bed. Sometime later, he heard someone say something was going to happen that morning. He got out of bed again but, this time, got dressed in black clothing. He put on a vest holding eight magazines of ammunition and retrieved his AR-15 assault rifle. Looking out the window of his room on the front of the compound, he saw two cattle

trailers approaching the compound. He joined Koresh and others at the front door. After gunfire erupted through the door, he attempted to chamber a round in his rifle, but it jammed. He returned to his room, retrieved a 9mm Beretta pistol he had purchased himself, and went down the hall to another room on the first floor facing the front of the compound.

According to his statement, after the cease-fire was declared, Castillo went to the kitchen area toward the rear of the compound. He grabbed an AK-47 lying on the kitchen table and proceeded to the rear door of the compound. He observed two wounded ATF agents, one on the roof and one on the ground. In addition, he saw four agents searching for the wounded agents.

Other witnesses corroborated and supplemented Castillo's account of his actions during the gunbattle. Marjorie Thomas witnessed Castillo with a gun on the second floor of the compound during the gunfight. According to Thomas, he looked around and then left. Kathryn Schroeder testified that, after the gunbattle, Castillo informed her that he had been at the front door with Koresh but had returned to his room.

Special Agent Bernadette Griffin, one of the four agents sent to rescue ATF agent King at the rear of the compound, confirmed Castillo's presence at the rear of the compound during the cease-fire. She saw an individual at the rear door of the compound with a gun, who she later identified as Castillo. According to Griffin, Castillo watched

the agents and briefly aimed his weapon at her while they were rescuing Agent King.

Finally, during the subsequent stand-off with the FBI, Schroeder asked Castillo about his weapon and need for ammunition. Castillo informed her that he had an AK-47, along with ammunition for it. Schroeder offered more ammunition, but Castillo refused, stating, "Well, I don't want more, I don't want any more than what I've got."

Based on this evidence, a reasonable jury could find that Castillo actively participated in the gunbattle on February 28. His actions were not those of a passive witness but rather evince an active role in the firefight. The jury could reasonably infer the intent to repel the ATF agents with deadly force from his dress, his attempt to chamber a round at the front door, and his immediate flight to his room to retrieve another weapon. Moreover, despite the absence of direct evidence that he fired his weapon that morning, the jury could reasonably find that he did shoot at the ATF agents. Numerous ATF agents testified regarding the large volume of gunfire coming from the rooms at the front of the compound, and Castillo admitted that he was in a room at the front, armed with a gun, during the gunbattle.

Kevin Whitecliff

Kathryn Schroeder testified that, after the gunbattle, Whitecliff told her that he had fired at the helicopters approaching from the north. In addition, Whitecliff stood guard in the chapel with Marjorie Thomas after the gunbattle. During that time, Thomas overheard Whitecliff claim that he

had shot someone outside the compound during the ATF raid. Based on this evidence, a reasonable jury could conclude that Whitecliff actively participated in the gunbattle on February 28. Indeed, on appeal, Whitecliff concedes that he was shooting towards the helicopters to the north.

Finally, in response to this evidence showing their participation in the gunbattle, the defendants argue that the Government did not prove who actually killed the agents and that each one of them assisted those individuals or small group of individuals. According to the Davidians, mere participation in the gunbattle itself is insufficient to convict them of aiding and abetting the voluntary manslaughter of federal agents killed during the gunbattle. Along this line, Whitecliff emphasizes that he shot toward the helicopters to the north of the compound, while the four ATF agents were killed on the other side of the compound. We are not persuaded.

In a prosecution for aiding and abetting a crime, the Government need not identify a specific person or group of individuals as the principal. *United States v. Campa*, 679 F.2d 1006, 1013 (1st Cir. 1982); *Hendrix v. United States*, 327 F.2d 971, 975 (5th Cir. 1964). To the contrary, the Government need only show that "the substantive offense had been committed by someone and that the defendant aided and abetted him." *Campa*, 679 F.2d at 1013; *see also United States v. Yost*, 24 F.3d 99, 104 (10th Cir. 1994) ("All that is required for a conviction based on 18 U.S.C. § 2 is a finding that [the defendant] aided *someone* in committing the crime.") (emphasis in original). The Government never claimed to be able to prove who fired the specific rounds that

killed the four ATF agents. The inability to identify the actual gunmen, however, does not negate the evidence proving that someone in the compound killed the agents.

Moreover, the defendant need not fire a weapon to aid and abet murder or manslaughter. *Cf. United States v. Villarreal*, 963 F.2d 725, 730 (5th Cir.) (holding that subduing victim aided and abetted murder), *cert. denied*, 506 U.S. 927, 113 S.Ct. 353, 121 L.Ed.2d 267 (1992). We find no difficulty in holding that actively participating in a gunbattle in which a gunman kills a federal officer can aid and abet that killing.

We affirm the convictions on Count 2.

B.

The jury convicted Avraam, Branch, Castillo, Craddock, and Whitecliff of using or carrying a firearm during and in relation to the commission of a crime of violence in violation of 18 U.S.C. § 924(c)(1). The jury acquitted Fatta on this count.

To sustain the Davidians' convictions under 18 U.S.C. § 924(c)(1), the Government must prove that the defendant "used or carried a firearm" and that the use or carrying was "during and in relation to" a "crime of violence." *Smith v. United States*, 508 U.S. 223, 227-28, 113 S.Ct. 2050, 2053, 124 L.Ed.2d 138 (1993); *United States v. Harris*, 25 F.3d 1275, 1279 (5th Cir.), *cert. denied*, --- U.S. ---, 115 S.Ct. 458, 130 L.Ed.2d 366 (1994). The Davidians contend that

there is insufficient evidence of the three elements. We address each element in turn, beginning with the last.

1.

The predicate crime of violence charged in the indictment was conspiracy to murder federal agents in violation of 18 U.S.C. § 1117 as charged in Count 1. The crime of conspiracy contains three elements: 1) two or more people agreed to pursue an unlawful objective; 2) the individual defendant voluntarily agreed to join the conspiracy; and 3) one or more of the members of the conspiracy performed an overt act to further the objectives of the conspiracy. *United States v. Baker*, 61 F.3d 317, 325 (5th Cir. 1995). When the object of the conspiracy is second-degree murder, the Government must additionally prove that the individual defendant conspired to kill with malice aforethought. *United States v. Chagra*, 807 F.2d 398, 401, 403 (5th Cir. 1986), *cert. denied*, 484 U.S. 832, 108 S.Ct. 106, 98 L.Ed.2d 66 (1987); *United States v. Harrelson*, 754 F.2d 1153, 1172-73, *reh'g denied*, 766 F.2d 186, 189 (5th Cir.), *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241 (1985), *and cert. denied*, 474 U.S. 1034, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985).

The Davidians argue that, even if a conspiracy to murder federal agents existed, there is insufficient evidence showing that each voluntarily joined that conspiracy. According to the Davidians, they were each excluded from Koresh's inner circle and knew nothing of his murderous plans. We are not persuaded.

That the jury acquitted the defendants of the predicate crime of conspiracy to murder federal agents as charged in Count 1 did not negate the jury's guilty verdict on Count 3. "[I]t is only the fact of the offense, and not a conviction, that is need to establish the required predicate." *Munoz-Fabela*, 896 F.2d at 910-11; *Ruiz*, 986 F.2d at 911 (holding that acquittal on predicate offense does not bar conviction under 18 U.S.C. § 924(c)).

The record is replete with evidence of a conspiracy to murder federal agents and each individual defendant's membership in that conspiracy. In "Bible studies," Koresh taught that there would be a battle between the "beast" and the Davidians. There was no doubt that the "beast" was the ATF and FBI. Indeed, residents watched a film entitled "Breaking the Law in the Name of the Law: The ATF Story," an unfavorable portrayal of the ATF. Koresh also told the women to become strong so as to prevent the U.S. Army from raping them.

The evidence in the record also shows how Koresh expected the residents to respond if the "beast" approached the compound. Koresh instructed the Davidians to kill the "enemy", an instruction driven home by Koresh's admonition that "if you can't kill for God, you can't die for God." Indeed, final salvation and deliverance to Heaven--or "translation" as the Davidians called it--could occur either through immediate delivery to Heaven or through death in battle.

Koresh and the Davidians began preparing for this final battle. The Davidians fortified the compound, building

an underground shelter. Koresh, along with Paul Fatta and Mike Schroeder, purchased large amounts of weapons and ammunition. Koresh incorporated firearms into his apocalyptic message. Weapons were often passed out at Bible studies, while Koresh instructed the Davidians in their use and maintenance. Residents practiced shooting, at times aiming at a target head. The women sewed vests and black pants capable of holding multiple ammunition magazines for all of the men. At Passover in the Spring of 1992, Koresh announced that it would be the last Passover, that the end was coming. In short, there was a climate of both fear and aggression at Mount Carmel prior to February 28.

At the least, the conspiracy to murder federal agents matured on February 28. The defendants' conduct on that day more than suffices to demonstrate both the existence of the conspiracy and their membership in it.

Shortly before the raid, ATF undercover agent Roberto Rodriguez visited the compound and spoke with Koresh. During their conversation, Koresh was informed that he had a phone call and left the room. When Koresh returned, he was "literally shaking." Koresh told Rodriguez, "Robert, neither the ATF or National Guard will ever get me. They got me once and they'll never get me again." Koresh looked out the front windows and repeatedly exclaimed, "They're coming, Robert. The time has come."

After Rodriguez left, the evidence shows that Koresh and the other Davidians began preparing for the ATF raid. Sometime during the morning, both Kathryn Schroeder and Victorine Hollingsworth learned that all the women were to

go to the chapel. When they got there, they noticed that no men were present. Koresh later came into the chapel and told the women to get back to their rooms and "watch". According to Schroeder, Koresh was wearing a black, magazine vest and carrying an AK-47. Other men at the compound were also dressed in black clothing and carried weapons, and Kathryn Schroeder testified that the Davidians loaded ammunition prior to the raid.

Contrary to the defendants' arguments, the evidence supports the jury's conclusion that each was a member of this conspiracy, that each was a "Member of the Message." Koresh's "Bible studies" were an integral part of the conspiracy. As both Kathryn Schroeder and Victorine Hollingsworth testified, all adult Davidians were expected to attend these studies and usually did. Hollingsworth confirmed that Craddock usually attended Koresh's studies.

The actions of each defendant on the morning of the ATF raid and thereafter signal membership in this conspiracy. To repeat: Each defendant actively participated in the gunbattle. Branch roamed the second floor, firing in each room. Whitecliff shot at the helicopters. Castillo attempted to shoot while he was at the front door with Koresh; he later kept armed watch over the four ATF agents rescuing Agent King. Although no one saw Avraam fire during the gunbattle, Avraam told Schroeder afterwards that he had done so.

The evidence also shows that Craddock, who was acquitted of aiding and abetting the voluntary manslaughter of federal agents, was a member of the conspiracy to murder

the agents. On April 19, after fleeing the blazing compound, Craddock gave a post-arrest statement and, the next day, testified before a grand jury. Craddock's post-arrest statement and grand jury testimony belie his claim of innocence.

Craddock arrived at Mount Carmel almost a full year before the ATF raid. He received firearms training, and, two weeks before the ATF raid, he was issued a pistol and an AR-15, which he kept in his room. On February 28, Craddock learned of the impending ATF raid. He saw Rodriguez meeting with Koresh and overheard Koresh say, "They're coming. Whether the BATF or FBI or whatever, they are coming." Peter Hipsman confirmed the likelihood of an ATF raid later that morning, telling Craddock that David Jones had been outside the compound and had heard that approximately 75 ATF agents had arrived at the Waco airport. Tellingly, after learning of the impending ATF raid, Craddock returned to his room and retrieved his AR-15. He got dressed in black clothing and donned his ammunition vest. Later, he went to the kitchen to get ammunition for his 9mm handgun, which he loaded. When asked why he did these things, Craddock responded, "I did what I think was expected of me." Even in spite of Craddock's self-serving claim that he did not shoot at the ATF agents that morning, a reasonable jury could find that he was a member of the conspiracy to murder federal agents.

A reasonable jury could also have found that this conspiracy continued long after the February 28 raid. After the cease-fire, the Davidians developed a plan to exit the compound, fire at the agents, and die in the ensuing battle. Although the Davidians did not execute that plan, the

remaining residents engaged in a stand-off with the FBI for over fifty days. Whitecliff and Branch stood guard in the chapel with an FN-FAL and M-1A, respectively. Castillo stood guard with an AK-47 in his room on the first floor. Craddock, who had an AR-15, kept his armed vigil in Kathryn Schroeder's bedroom on the first floor. Avraam stood guard above the gym or chapel with a .50 caliber rifle. As Kathryn Schroeder and Marjorie Thomas, both of whom also stood guard, testified, the Davidians were instructed to open fire if the FBI attempted to enter the compound. Craddock maintained an electrical generator and kept the telephone line in working order.

The compound residents were free to leave Mount Carmel at any time. The Davidians chose to remain, to stand guard against the FBI, and, if necessary, to use deadly force to repel the FBI.

The defendants argue that this evidence only shows that they were present at Mount Carmel and associated with some of the residents there. *See United States v. Espinoza-Seanez*, 862 F.2d 526, 538-39 (5th Cir. 1988) (reversing conspiracy conviction based on mere association with conspirators and presence in foul climate). But a reasonable juror could see an entirely different picture, not innocent individuals caught "in the wrong place, at the wrong time," but active participants in an armed camp, willing to defend that camp with deadly force and to die with the firm belief that eternal salvation was their divine reward.

Craddock separately argues that there was insufficient evidence that he conspired to murder federal agents with

malice aforethought. In particular, Craddock emphasizes that he did not fire a shot the day of the ATF raid and, therefore, cannot have had the requisite mental state. Even accepting this self-serving factual assertion, we disagree with the legal conclusion Craddock draws from it.

Malice aforethought means "an intent, at the time of a killing, wilfully to take the life of a human being, or an intent wilfully to act in callous and wanton disregard of the consequences to human life; but 'malice aforethought' does not necessarily imply any ill will, spite or hatred towards the individual killed." *Harrelson*, 766 F.2d at 189 n.5 (quoting 2 E. Devitt & C. Blackmar, *Federal Jury Practice and Instructions* 215 (1977)). The evidence shows that Craddock attended Bible studies, at which Koresh preached of the need to kill the enemy; that Craddock received several firearms and participated in firearms training; that, upon learning of the impending ATF raid on February 28, he changed clothing and retrieved his weapons; and that, after the raid, he chose to remain in the compound during the stand-off, despite the possibility of further bloodshed. *Cf. Chagra*, 807 F.2d at 404 (rejecting non-gunman's insufficiency of evidence challenge to conviction for conspiracy to murder).

Based on this evidence, a reasonable jury could find that a conspiracy to murder federal agents existed and that each of the five defendants voluntarily joined that conspiracy with the requisite mental state.

We are also persuaded that sufficient evidence supports the conviction for using or carrying a firearm during the conspiracy. In *Bailey v. United States*, --- U.S. ---, ---, 116 S.Ct. 501, 509, 133 L.Ed.2d 472 (1995), the Supreme Court reversed the § 924(c)(1) gun convictions of two defendants, one of whom had kept an undisclosed firearm in a footlocker in a bedroom closet and the other of whom had concealed an undisclosed firearm in the trunk of his car. The Court explained that "use" required more than "mere possession" of a firearm by the defendant. *Id.* at 506. Rather, the Government must show "active employment" of the firearm. *Id.*

The "active employment" requirement is not an overly taxing one. The Court gave several examples of conduct constituting "active employment," among them, "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Id.* at 508. While the Court held that storing a concealed weapon nearby for potential use did not constitute "active employment," it noted that "an offender's reference to a firearm in his possession could satisfy § 924(c)(1)." *Id.* Finally, the Court held out the possibility that the "carry" prong of § 924(c)(1) reached conduct that the "use" prong did not. *Id.* at 509.

Like the Supreme Court in *Bailey*, we need not address whether the evidence suffices to establish that the defendants "carried" a firearm during the conspiracy. The evidence is overwhelming that each of the five defendants "used" a firearm as the Supreme Court has defined the term. The evidence demonstrates that Branch and Whitecliff fired their weapons on the 28th. By his own admission, Castillo

attempted to chamber a round at the front door and, after the cease-fire, brandished a weapon while the ATF rescued one of its injured agents. Similarly, according to his own statements, Craddock retrieved his AR-15 assault rifle, loaded ammunition into his handgun, and awaited instructions. Finally, Avraam admitted to Schroeder that he had fired a weapon on February 28.

There was also evidence that after the ATF raid, all of the defendants stood watch in the compound with loaded firearms. In particular, FBI Special Agent Toulouse witnessed a .50 caliber rifle protruding from a hole in wall of the compound near the rear. Avraam reportedly stood guard in that area with one of the Davidians' two .50 caliber rifles. Based on this evidence, a reasonable jury could find that the defendants used a firearm during the conspiracy.

3.

Lastly, the defendants claim that the evidence is insufficient to show that each used a firearm "during and in relation" to the conspiracy to murder federal agents. In particular, Branch argues that the evidence only indicates that he used his firearm in self-defense. We disagree.

There is no question that each defendant used his firearm "during" the conspiracy. *See Smith*, 508 U.S. 237, 113 S.Ct. at 2058. Nor is there any question that each used his firearm "in relation" to the conspiracy. In *Smith*, the Supreme Court explained that § 924(c)(1)'s requirement that the firearm be used "in relation to" the predicate offense

ensures that the firearm must have "some purpose or effect with respect to" the predicate offense, that it "facilitate or have the potential of facilitating" that crime. *Id.* at 2059 (alterations omitted). Stated negatively, the firearm's presence or involvement "cannot be the result of accident or coincidence." *Id.*

The use of the firearms during and after February 28 was not accidental; it was part and parcel of the conspiracy to murder federal agents. We have affirmed § 924(c)(1) convictions where the relationship between the firearm and the predicate offense has been far more attenuated than here. *See United States v. Wilson*, 884 F.2d 174, 177 (5th Cir. 1989).

Finally, Whitecliff's argument that the evidence does not show that he used his firearm during and in relation to the conspiracy to murder the federal agents "at the front door" misapprehends the scope of the conspiracy. The conspiracy to murder federal agents did not end with the death of the four agents on February 28. Rather, there was evidence that beginning prior to February 28 and continuing for almost two months after the ATF raid, the defendants conspired to kill any federal agent who attempted to approach the compound. Firing at the National Guard helicopters approaching the compound and standing guard during the ensuing stand-off was Whitecliff's contribution to that conspiracy.

In sum, we are persuaded that the evidence supports the Davidians' convictions for violating § 924(c)(1). We affirm the convictions on Count 3.

C.

The jury convicted Fatta of conspiring to unlawfully manufacture and possess machineguns and of aiding and abetting the unlawful possession of machineguns, both in violation of 18 U.S.C. § 922(*o*). We address both counts jointly.

Whether the object of the conspiracy is murder or the unlawful manufacture and possession of machineguns, the Government must prove the same, three elements: 1) two or more people agreed to pursue the unlawful objective; 2) the individual defendant voluntarily agreed to join the conspiracy; and 3) one or more of the members of the conspiracy performed an overt act to further the objectives of the conspiracy. *Baker*, 61 F.3d at 325. Similarly, whether the crime is voluntary manslaughter or possession of machineguns, the Government must prove that each defendant 1) associated with the criminal venture, 2) participated in the venture, and 3) sought by action to make the venture succeed. *Nye & Nissen*, 336 U.S. at 619, 69 S.Ct. at 770; *Menesses*, 962 F.2d at 427.

Fatta argues that there is no evidence showing that he knew of or voluntarily agreed to join the conspiracy to manufacture and possess machineguns. According to Fatta, the evidence shows only that he lawfully purchased firearms, ammunition, and accessories. He emphasizes that other Davidians, not he, purchased the parts and tools for converting semiautomatic weapons to fully automatic ones. Finally, Fatta argues that there is no evidence that he assisted Koresh in possessing machineguns.

The evidence at trial supports the jury's verdict on both counts. After Koresh began preaching about the upcoming confrontation with the "beast", Paul Fatta began traveling to gun shows and purchasing weapons. Firearm records indicated that Fatta purchased a large number of firearms and related accessories in the two years prior to the ATF raid. Included among Fatta's purchases were semiautomatic AK-47 and .308 caliber FN-FAL assault rifles, magazines, and cases of ammunition. In December 1991, Fatta traveled with Koresh to Indiana to purchase guns. On that trip, Koresh and Fatta together bought approximately $25,000 worth of firearms.

The evidence also demonstrates that the Davidians were engaged in the conversion of semiautomatic firearms to fully automatic firearms. Kathryn Schroeder testified that fully automatic guns were made at the compound and that the residents knew about it. According to Schroeder, Koresh announced at a Bible study that "we're going to take a gun that goes rat-tat-tat and make it into a gun that goes rata-tat-tat." Indeed, numerous fully-automatic weapons were recovered from the ruins of Mount Carmel after April 19.

Invoices from firearm suppliers confirmed Schroeder's testimony. The Davidians had ordered parts and tools used in manufacturing fully automatic weapons. These items were shipped to the Mag Bag, a garage located a short distance from the compound used by the Davidians for the buying and selling of firearms. In particular, conversion kits, along with books and videotapes on how to convert semiautomatic weapons into fully automatic machineguns, were shipped to the Mag Bag.

The evidence left no doubt as to Fatta's involvement in the Davidians' automatic weapons operations. Two of the fully automatic weapons recovered from the ruins of Mount Carmel had been purchased by Fatta as semiautomatic weapons and later converted. Fatta's personal checks were discovered in the machine room where the Davidians manufactured machineguns and silencers.

Moreover, the evidence demonstrated Fatta's involvement with the Mag Bag. Fatta procured a Texas Sales/Use Tax Permit in February 1992 for the Mag Bag. The application for the permit listed Fatta as the owner of the Mag Bag, and, contrary to Fatta's suggestion that the Mag Bag was simply an automotive repair shop, it indicated that "gun and firearm accessories" were the "primary product" sold by the Mag Bag. Numerous firearm purchase invoices and related documentation also confirmed Fatta's association with the Mag Bag. In fact, among the items found in a search of the Mag Bag was a phone bill addressed to the Mag Bag listing Fatta as the account name. Based on this evidence, a reasonable jury could find that Fatta voluntarily joined the conspiracy to manufacture and possess machineguns.

In response, Fatta argues that, even so, there is no *direct* evidence of his knowledge that the weapons were machineguns. Even more brazenly, Fatta claims that the Government must prove that he knew his conduct was illegal, relying on *Ratzlaf v. United States*, 510 U.S. 135, 114 S.Ct. 655, 126 L.Ed.2d 615 (1994). We disagree with both arguments.

The Government may prove Fatta's knowledge through either direct or circumstantial evidence. *Staples v. United States*, 511 U.S. 600, --- n. 11, 114 S.Ct. 1793, 1802 n. 11, 128 L.Ed.2d 608 (1994) (noting that knowledge of machinegun's status as such "can be inferred from circumstantial evidence"). There was abundant circumstantial evidence of Fatta's knowledge that machineguns were being manufactured and possessed by Koresh and the other Davidians. *See United States v. Tylkowski*, 9 F.3d 1255, 1260 (7th Cir. 1993).

Nor must the Government prove Fatta knew his conduct to be illegal. *Cheek v. United States*, 498 U.S. 192, 198-99, 111 S.Ct. 604, 609, 112 L.Ed.2d 617 (1991); *Staples*, --- U.S. at --- n. 3, 114 S.Ct. at 1805 n.3 (Ginsburg, J., concurring in the judgment). Fatta's reliance on *Ratzlaf* is misplaced. *Ratzlaf* was a prosecution under 31 U.S.C. § 5322(a) for structuring a financial transaction for the purpose of evading currency reporting requirements. There, the Supreme Court found that Congress in that particular statute had chosen to depart from the general rule that ignorance of the law is no defense to a criminal charge. *Id.* at 663. Fatta offers no argument based on statutory text, legislative history, or case law suggesting that Congress has acted in a similar fashion with regard to § 922(*o*). Nor could he. *See United States v. Farrell*, 69 F.3d 891, 893 (8th Cir. 1995) (holding that § 922(*o*) does not require knowledge of law or intent to violate it), *cert. denied*, 116 S.Ct. 1283 (1996).

In sum, a reasonable jury could find that Fatta willingly joined a conspiracy to manufacture and possess

machineguns. In addition, the jury could find that he aided and abetted Koresh in possessing machineguns.

VI.

The district court sentenced Avraam, Branch, Castillo, and Whitecliff to the statutory maximum of 10-years imprisonment on Count 2 and to 30-years imprisonment on Count 3, such terms to be served consecutively; Craddock to 10-years imprisonment on Count 3 and to 10-years imprisonment on Count 7, such terms to be served consecutively; and Fatta to consecutive prison sentences of 5 years for Count 9 and 10 years for Count 10. In addition, the district court ordered all of the Davidians to pay restitution of over $1.1 million.

We first address the defendants' challenge to their sentences on Count 3 for using or carrying a firearm during and in relation to a crime of violence. We then turn to the defendants' individual sentencing claims. We conclude our review with the restitution order.

A.

18 U.S.C. § 924(c)(1) defines both the crime and the applicable sentence. It provides:

> Whoever, during and in relation to any crime of violence or drug trafficking crime . . . , uses or carries a firearm, shall, in addition to the punishment

> provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, to imprisonment for ten years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years.

Finding that each of the five defendants had used or were criminally responsible for someone who had used a machinegun during the conspiracy, the district court sentenced Avraam, Branch, Castillo, and Whitecliff to 30-years imprisonment. Although the district court found that Craddock was also subject to the 30-year sentence, it departed downward from the mandatory statutory term and sentenced Craddock to only 10-years imprisonment on Count 3. The United States has not cross-appealed Craddock's sentence on this count.

The Davidians claim that the district court improperly enhanced their sentences for using a machinegun. The Davidians point out that the indictment did not allege nor did the jury find that each had used a machinegun. Rather, the indictment alleged and the jury found only that each had used a "firearm". According to the Davidians, the determination whether the defendant used one of the aggravating firearms enumerated in § 924(c)(1) lies with the jury, not the court at sentencing. Consequently, the Davidians ask us to vacate their sentence on that count and remand with instructions to impose only a 5-year prison sentence on Count 3.

The validity of the district court's action turns upon whether § 924(c)(1)'s machinegun provision creates a separate, independent offense or is a sentence-enhancement provision. This question is one of first impression. The United States and the Davidians rely on the case law, waging a war of dicta. We begin with first principles.

Whether § 924(c)(1)'s machinegun provision "creates an independent federal offense or is merely a sentence-enhancement provision is a matter of legislative intent." *United States v. Jackson*, 891 F.2d 1151, 1152 (5th Cir. 1989) (per curiam), *cert. denied*, 496 U.S. 939, 110 S.Ct. 3221, 110 L.Ed.2d 668 (1990). In prior cases, we have suggested that four factors are illuminating: 1) whether the statute predicates punishment upon conviction under another section; 2) whether the statute multiplies the penalty received under another section; 3) whether the statute provides guidelines for the sentencing hearing; and 4) whether the statute is titled as a sentencing provision. *Id.* These factors, however, complement and do not substitute for our traditional tools of statutory interpretation, namely, the statute's text and legislative history. *See United States v. Davis*, 801 F.2d 754, 755 (5th Cir. 1986) (enumerating four factors but explaining that statute's text is "primary guide to congressional intent").

Section 924(c)(1) defines a crime whose existence turns upon the commission of another crime. The statute requires another offense--either a "crime of violence or drug trafficking crime"--though, as we have made clear, the defendant need not be charged or convicted of that predicate offense. The relationship between § 924(c)(1) and the predicate crime of violence or drug trafficking crime is not

at issue here. Decisions discussing that relationship are, therefore, not helpful. *See Munoz-Fabela*, 896 F.2d at 910 (holding that § 924(c) provides independent basis for criminal liability from *predicate offense*). The key is the relationship between prohibiting the use or carrying of a firearm during such predicate offense (the firearm clause) and mandating a 30-year sentence when the firearm is a machinegun (the machinegun clause).

The text of § 924(c)(1) forecloses neither of these two competing readings of the statute. The legislative history and statutory structure, however, persuade us that the machinegun clause of § 924(c)(1) is a sentence-enhancement provision.

The Gun Control Act of 1968, Pub.L.No. 90-618, § 102, 82 Stat. 1213 (1968), created § 924(c), which provided in relevant part:

> Whoever--
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,
>
> shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years.

Congress later merged the two clauses into the text we know today but did not distinguish among types of firearms. The

Comprehensive Crime Control Act of 1984, Pub.L.No. 98-473, § 1005, 98 Stat. 1837, 2138 (1984).

In 1986, Congress enacted the Firearms Owners' Protection Act, Pub.L.No. 99-308, § 104, 100 Stat. 449, 456 (1986), adding the machinegun clause to the statute. Congress appended the machinegun clause to the firearm clause, rather than create a new section.

The House Report accompanying the 1986 Act explained that the provision "add[ed] a new mandatory prison term . . . for using or carrying a machinegun during and in relation to a crime of violence" and referred to the provision as the "[e]nhanced penalty for machine gun use in crime." *See* H. Rep. No. 495, 99th Cong., 2d Sess. 28 (1986), *reprinted in* 1986 U.S.C.C.A.N. 1327, 1354. Floor debates also referred to the provision as requiring a "mandatory prison term", providing "mandatory penalties", or requiring "stiff mandatory sentences" for use of a machinegun. *See* 132 Cong.Rec. 9603 (statement of Sen. McClure); 132 Cong.Rec. 3809 (statement of Rep. Hughes), 4512 (statement of Rep. Hughes), 6837 (statement of Rep. Hughes), 6843 (statement of Rep. Volkmer), 6850 (statement of Rep. Moore), 6856 (statement of Rep. Wirth), 6857 (statement of Rep. Gallo), 7081 (statement of Rep. Gallo). Representative Hughes described the provision as "creating a new extra mandatory prison term for carrying a machinegun." 132 Cong.Rec. H1646. Noticeably absent from both the House Report and the floor debates was any discussion suggesting the creation of a new offense.

Subsequent acts increased the mandatory prison term for using or carrying a machinegun and subjected criminals who use or carry destructive devices or other types of firearms to the enhanced penalties. *See* Anti-Drug Abuse Act of 1988, Pub.L.No. 100-690, § 6460, 102 Stat. 4181, 4373 (1988); Crime Control Act of 1990, Pub.L.No. 101-647, § 1101, 104 Stat. 4789, 4829 (1990). At no point did Congress indicate that it intended to create a new, separate offense for those weapons. *See* H. Rep. No. 681, 101st Cong., 2d Cong. 107 (1990), *reprinted in* 1990 U.S.C.C.A.N. 6472, 6511 (describing amendment to section as intending "to increase the mandatory additional penalties for using or carrying certain weapons during a crime of violence or a drug felony"); 134 Cong.Rec. S17360 (Judiciary Committee section analysis) (describing amendment to section as increasing the "mandatory penalty" for using a machine gun).

The defendants rely on our suggestion in *United States v. Correa-Ventura*, 6 F.3d 1070, 1087 n. 35 (5th Cir. 1993), that § 924(c) may require the jury to agree on which type of weapon was used "in order for the court to assess the appropriate penalty." *Correa-Venture* held, however, that the jury need not agree on which firearm was actually used by the defendant where all of the firearms were from the same class of weapons. The suggestion was dicta.

In addition, for support for the suggestion, we cited the Sixth Circuit's opinion in *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, 507 U.S. 932, 113 S.Ct. 1315, 122 L.Ed.2d 702 (1993), *and cert. denied*, 507 U.S. 998, 113 S.Ct. 1617, 123 L.Ed.2d 177 (1993), *and cert. denied*, 507 U.S. 999, 113 S.Ct. 1620, 123 L.Ed.2d 179

(1993). *Sims*, upon which the Davidians also rely, did not address the issue here. Rather, *Sims* held that, where the Government charges two separate § 924(c) counts, one for a "firearm" and one for an enhancing weapon, such as a machinegun, the district court "must consolidate those section 924(c) counts so that no defendant will be convicted on more than one gun count relative to the one drug trafficking offense." *Id.* at 1235. *Sims* did not hold that the Government must charge the defendant with using an enhanced firearm. *See also United States v. Martinez*, 7 F.3d 146 (9th Cir. 1993). That the Government can include separate counts in the indictment for each type of firearm does not answer our statute.

Nor is the Davidians' reliance on *United States v. Melvin*, 27 F.3d 710 (1st Cir. 1994), well-placed. The jury convicted Melvin of using a "firearm", and he was sentenced to a five-year term as specified in § 924(c). The Government appealed, arguing that given the prevalence of machineguns among the other firearms, a finding that defendants used machineguns was "implicit and inescapable" from the jury's verdict. *Id.* at 714. The First Circuit disagreed, holding that "[o]ur task in these circumstances, however, is not to determine whether the evidence and argument could support the government's interpretation of the jury's verdict, but whether it inevitably must lead to such a construction." *Id.* On the facts before it, the First Circuit concluded that it could not exclude the possibility that the jury had convicted the defendants based on a finding that they possessed only a firearm and not the machineguns. *Id.* at 715.

In *Melvin*, the Government conceded that the 30-year term is available "only if the jury specifically identifies a machine gun or silencer as the firearm supporting the conviction." *Id.* at 714.[5] The court expressly refused to consider the validity of that reading of § 924(c). *See id.* at 715 n. 9 (refusing to consider whether it is jury's or court's role to find nature of weapon used by defendant). Unlike *Melvin*, the Government here has contested that interpretation of § 924(c).

The statute's structure and its legislative history persuade us that Congress did not intend to create a new, separate offense by adding the machinegun clause to § 924(c). The Government need not charge in the indictment nor must the jury find as part of its verdict the particular type of firearm used or carried by the defendant.

The Davidians next argue that, even so, there is insufficient evidence for the district court to find by a preponderance of the evidence that each one of them used or carried a machinegun during and in relation to the conspiracy to murder federal agents. The district court found that "[e]ach either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege."

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[5] Although the Government had conceded the point, the First Circuit cited *Martinez* and *Sims* for support for this proposition. As noted above, those decisions did not address that specific issue.

§ 924(c) requires more than "mere possession" of a firearm by the defendant. *Bailey v. United States*, --- U.S. ---, ---, ---, 116 S.Ct. 501, 506, 509, 133 L.Ed.2d 472 (1995). The Government must show "active employment" of the firearm. *Id.* The district court did not have the benefit of *Bailey* and found only that each defendant had actual or constructive possession of an enhanced weapon. This finding does not meet the statutory requirement as read by *Bailey*.

As we have explained, there is evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy in the firefight of February 28. The jury was not required to do so and the district court entered only those findings then required. With *Bailey* the district court must take another look and enter its findings regarding "active employment." Should the district court find on remand that members of the conspiracy actively employed machineguns, it is free to reimpose the 30-year sentence. We vacate the defendants' sentences on Count 3 and remand for resentencing on that count.

We note that, on remand, the district court should consider whether the defendants actively employed a weapon during and in relation to the conspiracy to murder federal agents.

B.

Branch, Castillo, Craddock, and Fatta raise numerous objections to the district court's application of the Sentencing

Guidelines. We review the application of the sentencing guidelines de novo and its findings of fact for clear error. *United States v. Palmer*, 31 F.3d 259, 261 (5th Cir. 1994). We address the sentence on each count in turn.

1.

The district court sentenced Avraam, Branch, Castillo, and Whitecliff to the statutory maximum 10-years imprisonment on Count 2 for aiding and abetting the voluntary manslaughter of federal agents. Branch and Castillo contest the application of the Sentencing Guidelines on Count 2.

The district court began with the base offense level of 25 from U.S.S.G. § 2A1.3 and added the 3-level enhancement for official victim pursuant to § 3A1.2(b) and the 2-level enhancement for obstruction of justice pursuant to § 3C1.1. Given their criminal history categories, the total offense level yielded guideline ranges of 108-135 months and 97-121 months, respectively. However, the statutory maximum sentence of 10-years imprisonment reduced the guideline ranges to 108-120 months and 97-120 months, respectively.

Branch and Castillo both contest the 3-level enhancement for an official victim. Section 3A1.2(b) of the Sentencing Guidelines provides for a 3-level enhancement if "during the course of the offense or immediate flight therefrom, the defendant . . . knowing or having reasonable cause to believe that a person was a law enforcement or

corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury." Branch argues that there is insufficient evidence that he knew the agents' official identity. Castillo claims that the jury's acquittal of the Davidians on Count 1 (conspiracy to murder federal agents) precludes enhancing his sentence for assault on a law enforcement officer.

We think it beyond cavil that the Davidians knew the agents' identity on February 28, 1993. We do not address Castillo's argument since he did not object to the official victim enhancement either at the sentencing hearing or in his written objections to the Pre-Sentence Report. *See United States v. Chapman*, 7 F.3d 66, 69 (5th Cir. 1993) (holding defendant "waived any error based on this issue as he failed to raise it either in his written objections to the pre-sentence report or orally at the sentencing hearing"), *cert. denied*, --- U.S. ---, 114 S.Ct. 2713, 129 L.Ed.2d 839 (1994).

Castillo contests the 2-level enhancement for obstruction of justice. Section 3C1.1 provides for a 2-level enhancement "if the defendant willfully obstructed or impeded, or attempted to obstruct or impede, the administration of justice during the investigation, prosecution, or sentencing of the instant offense." Castillo claims that the district court's finding that he obstructed the execution of the search warrant for 51 days is not supported by sufficient evidence.

In his own post-arrest statement, Castillo admitted to participating in the initial gunbattle and the ensuing armed stand-off. In addition, Kathryn Schroeder, Marjorie Thomas,

and Victorine Hollingsworth all confirmed Castillo stood guard with a firearm during the stand-off. The district court's finding is not clearly erroneous.

Castillo next challenges the district court's refusal to reduce his offense for acceptance of responsibility. Section 3E1.1 provides a 2-level reduction "[i]f the defendant clearly demonstrates acceptance of responsibility for his offense." An additional 1-level reduction is available where, among other things, the defendant "has assisted authorities in the investigation or prosecution of his own misconduct by . . . timely providing complete information to the government concerning his own involvement in the offense." Castillo claims that he is entitled to the full, 3-level reduction, pointing out that he provided a statement to Texas Rangers immediately after his arrest.

The district court found this claim to be "ludicrous". We agree. Castillo pled not guilty to all charges against him. While conviction by trial does not "automatically preclude" the availability of this section, the Guidelines contemplate that those cases in which the defendant both accepts responsibility within the meaning of this section and goes to trial will be "rare". U.S.S.G. § 3E1.1, comment (n. 2); *United States v. Broussard*, 987 F.2d 215, 224 (5th Cir. 1993). Castillo contested his factual guilt, claiming that he acted in self-defense. Moreover, Castillo addressed the district court at sentencing and proclaimed that "we still stand on our innocence." He expressed no remorse or regret for his personal involvement in the deaths of the ATF agents. We agree with the district court that this is not one of those "rare" instances warranting the reduction. *See United States*

v. Waloke, 962 F.2d 824, 832 (8th Cir. 1992) (rejecting § 3E1.1 reduction where defendant claimed self-defense); *United States v. Sanchez*, 893 F.2d 679, 681 (5th Cir. 1990) (rejecting reduction due to defendant's lack of remorse).

Finally, Branch argues that the district court departed upwards from the guideline sentence and that insufficient evidence exists to justify the departure. The district court did not depart upwards from the sentencing guidelines but rather sentenced Branch to the statutory maximum 10-years imprisonment, which was within the guideline range.

We affirm the sentences on Count 2 for aiding and abetting the voluntary manslaughter of federal agents.

2.

The district court sentenced Craddock to the statutory maximum 10-years imprisonment on Count 7 for possession of an unregistered destructive device, such term to be served consecutively to that imposed on Count 3.

The district court began with Craddock's base offense level of 18. U.S.S.G. § 2K2.1. It added 6 levels for the involvement of 50 or more firearms pursuant to § 2K2.1(b)(1)(F), 2 levels for the involvement of a destructive device pursuant to § 2K2.1(b)(3), and 4 levels for possession of a firearm in connection with another felony pursuant to § 2K2.1(b)(5). The court then applied the § 2K2.1(c)(1)(A) cross-reference for possession of a firearm in connection with another offense, here, conspiracy to

murder federal agents. Application of the cross-reference yielded an adjusted base offense level of 43. To that, the district court added 3 levels for an official victim pursuant to § 3A1.2(b) and 2 levels for obstruction of justice pursuant to § 3C1.1. This yielded a total offense level of 48 and a guideline sentence of life imprisonment. *See* U.S.S.G. § 5A.

Craddock first contests the 2K2.1(c)(1)(A) cross-reference to § 2X1.1. Section 2K2.1(c)(1)(A) directs the sentencing court to apply § 2X1.1 if the defendant "used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm or ammunition with knowledge or intent that it would be used or possessed in connection with another offense." Here, the district court adopted the Pre-Sentence Report's finding that Craddock "was involved in a conspiracy that resulted in the murder of four federal agents."

Section 2X1.1, in turn, directs the sentencing court to apply the guideline for the "substantive offense," in other words, the object of the conspiracy. Craddock points to application note 2, which provides that "'[s]ubstantive offense,' as used in this guideline, means the offense that the defendant *was convicted of* soliciting, attempting, or conspiring to commit." U.S.S.G. § 2X1.1, comment (n. 2) (emphasis added). Craddock argues that his acquittal of Count 1 for conspiring to murder federal agents therefore bars application of the cross-reference.

As a general matter, that the jury acquitted Craddock of conspiring to murder federal agents does not preclude the

district court from finding in a sentencing hearing that Craddock did commit that offense. The sentencing court "may rely on facts underlying an acquitted count if the preponderance standard is satisfied." *See United States v. Allibhai*, 939 F.2d 244, 254 (5th Cir. 1991), *cert. denied*, 502 U.S. 1072, 112 S.Ct. 967, 117 L.Ed.2d 133 (1992). As we explained elsewhere, "[a]lthough the jury may have determined that the government had not proved all of the elements of the [other] offense beyond a reasonable doubt, such a determination does not necessarily preclude consideration of underlying facts of the offense at sentencing so long as those facts meet the reliability standard." *United States v. Juarez-Ortega*, 866 F.2d 747, 749 (5th Cir. 1989).

Nor are we persuaded that the § 2X1.1 cross-reference itself restricts the district court's ability to use the facts underlying the acquitted count in calculating the sentence on the convicted count. In *United States v. Smith*, 997 F.2d 396, 397 (8th Cir. 1993), the Eighth Circuit rejected the identical argument Craddock advances before us. In *Smith*, the court wrote:

> We reject Smith's argument that, under the 1991 amendment, a prerequisite for applying section 2X1.1 to him is a conviction for [the underlying offense]. The commentary to the 1991 version of section 2X1.1 requires the use of the Guideline applicable to the substantive offense that the defendant was "convicted" of attempting, soliciting or conspiring to commit. Section 2X1.1, comment (n.2) (1991). We conclude, however, that, when read in context, this commentary applies only if section

> 2X1.1 is applied directly, rather than as a cross-reference from section 2K2.1. The cross-reference provision contains no language requiring that the defendant be convicted of the other offense.

See also United States v. Fleming, 8 F.3d 1264, 1266 (8th Cir. 1993). That Smith was not charged with the underlying offense while Craddock was acquitted of it makes no difference. *See United States v. Concepcion*, 983 F.2d 369, 387-88 (2d Cir. 1992), *cert. denied*, 510 U.S. 856, 114 S.Ct. 163, 126 L.Ed.2d 124 (1993). In short, the district court did not err in applying the § 2K2.1(c) cross-reference for criminal conduct of which Craddock was acquitted.

Craddock next contests the 6-level enhancement for possession of more than 50 enhanced weapons and the 4-level enhancement for possessing a destructive device in connection with another felony offense. § 2K2.1(b)(1), (5). We do not address these contentions. Even assuming without deciding that these enhancements are not supported by the record, the application of the cross-reference obviated any impact these enhancements had on Craddock's sentence.

Nor do we address Craddock's last contention challenging the 3-point enhancement for an official victim pursuant to § 3A1.1. Even without that particular enhancement, Craddock's guideline sentence is life imprisonment. Stated another way, the official victim enhancement had no effect on the calculation of his guideline sentence.

We affirm Craddock's sentence on Count 7 for possession of an unregistered destructive device.

3.

The district court sentenced Fatta to the statutory maximum 5-years imprisonment on Count 9 for conspiring to manufacture and possess machineguns. In addition, the court sentenced Fatta to the statutory maximum 10-years imprisonment for aiding and abetting the possession of machineguns, such terms to be served consecutively.

To calculate Fatta's sentence, the district court grouped the two counts, yielding a base offense level of 18. It added 6 levels for the involvement of 50 or more firearms pursuant to § 2K2.1(b)(1)(F), 2 levels for the involvement of a destructive device pursuant to § 2K2.1(b)(3), and 4 levels for possession or transfer of firearms with knowledge, intent or reason to believe it would be used in connection with another felony pursuant to § 2K2.1(b)(5). The district court then applied the § 2K2.1(c)(1)(A) cross-reference for possession of a firearm in connection with another offense, here, the conspiracy to murder federal agents. Application of the cross-reference yielded an adjusted base offense level of 43 and a guideline sentence of life imprisonment. *See* U.S.S.G. § 5A.

Fatta first contests the § 2K2.1(c) cross-reference on two grounds. First, he contends that his acquittal on Count 1 of the conspiracy to murder federal agents precludes application of the cross-reference. Second, he argues that

there is insufficient evidence that he was a member of the conspiracy to murder federal agents.

The first argument is the same as Craddock's and fails for the same reason. The second argument is more problematic. Fatta was not present at Mount Carmel on February 28 or thereafter. Unlike the other defendants whose activities on the day of the ATF raid and thereafter demonstrated both the existence of and their membership in the conspiracy to murder federal agents, Fatta's membership in that conspiracy turns solely upon his conduct prior to February 28, 1993.

The district court adopted the PSR's findings that the Davidians had prepared in advance for a war with the U.S. Government and that "Paul Fatta assisted in this preparation by purchasing and thereby providing firearms for Koresh and other Davidians knowing these weapons would be used against law enforcement officials." This finding is not clearly erroneous.

We note that the district court need only be persuaded by a preponderance of the evidence that a conspiracy to murder federal agents existed prior to February 28. *United States v. Mackay*, 33 F.3d 489, 496 (5th Cir. 1994) (holding that district court "may base the findings underlying its sentence on facts in the record that have been proven by a preponderance of the evidence"). Kathryn Schroeder testified that Paul Fatta began going to gun shows and purchasing weapons *after* Koresh began preaching about the apocalyptic confrontation with the "beast". Indeed, Fatta was one of the Davidians' primary gun purchasers, and he traveled to gun

shows numerous times, on at least one occasion with Koresh himself.

In addition, Fatta had intimate knowledge of the amount and type of weapons purchased by Koresh and the other Davidians. Fatta was the owner of the Mag Bag, the machine shop through which much of the Davidians' firearm purchases flowed. Fatta himself purchased tens of thousands of dollars worth of semiautomatic assault rifles and handguns. He bought cases of ammunition and, on at least one occasion, nearly $300 worth of .50 caliber armor-piercing rounds. Several of the fully automatic weapons recovered from Mt. Carmel had been purchased by Fatta. We think that both the amount and type of firearms acquired by Fatta are significant. They are consistent with Koresh's instruction to prepare for an armed confrontation with the "beast"; these are not the armaments of weekend sportsmen or the efforts of an ardent gun collector. These were weapons of war, by type and quantity. In short, based on this evidence, the district court could reasonably find by a preponderance of the evidence that Fatta knew of and had joined the conspiracy to murder federal agents. The district court's application of the § 2K2.1(c) cross-reference is not erroneous.

We do not address Fatta's other contentions challenging the 6-level enhancement for possession of more than 50 enhanced weapons and the 4-level enhancement for possessing a destructive device in connection with another felony offense. U.S.S.G. § 2K2.1(b)(1), (5). As with Craddock, these enhancements had no effect on Fatta's sentence after the district court applied the § 2K2.1(c) cross-reference.

We affirm Fatta's sentences on Counts 9 and 10 for conspiring to manufacture and possess machineguns and aiding and abetting the possession of machineguns, respectively.

C.

The district court ordered the defendants to pay, jointly and severally, $1,131,687.49 in restitution. The court's initial order required that the restitution be paid "solely from the proceeds received by any Defendant from any contract which relates to the depiction of the crimes for which they were convicted in any movie, book, newspaper, magazine, radio or television production or live entertainment of any kind, or any expression of the Defendants' thoughts, opinions, or emotions regarding such crime." The defendants argue, and the Government concedes, that such a limitation would violate the First Amendment. *See United States v. Jackson*, 978 F.2d 903, 915 (5th Cir. 1992) (holding that "district court cannot limit restitution order solely to the income the defendants earn on speech associated with their criminal activities"), *cert. denied*, 508 U.S. 945, 113 S.Ct. 2429, 124 L.Ed.2d 649 (1993), *and cert. denied*, 509 U.S. 930, 113 S.Ct. 3055, 125 L.Ed.2d 739 (1993); *see also Simon & Schuster, Inc. v. Members of the New York St. Crime Victims Bd.*, 502 U.S. 105, 118, 112 S.Ct. 501, 509, 116 L.Ed.2d 476 (1991). The district court did not, however, attach the restriction as part of the judgments entered against the defendants. We affirm the judgments as entered.

VII.

We AFFIRM the convictions on Counts 2 and 3. Bound by court law upholding the constitutionality of 18 U.S.C. § 922(*o*), we AFFIRM Fatta's convictions on Counts 9 and 10. We VACATE the sentences on Count 3 and REMAND for findings and resentencing on that count. Finally, we AFFIRM the sentences on the remaining counts. We hold the mandate pending the decision in *United States v. Kirk*, 70 F.3d 791 (5th Cir. 1995), *opinion vacated*, 78 F.3d 160 (5th Cir. 1996).

SCHWARZER, District Judge, dissenting.

The court's opinion is thorough and workmanlike and deserves respect. I regret, however, that I am unable to agree on three points: (1) that the evidence was insufficient to entitle defendants to a self-defense instruction; (2) that it was not prejudicial error to exclude the portion of Castillo's statement which explained and qualified the portion received into evidence; and (3) that the evidence sufficed to establish the predicate offense of conspiracy to murder federal officers.

I. *THE FAILURE TO INSTRUCT ON SELF-DEFENSE*

A. *The Governing Standard*

Considerable confusion exists in this circuit over the precise formulation of the standard for determining whether

a defendant is entitled to an instruction on a theory of defense. This court recently held that "where the district court 'refuse[s] a charge on a defense theory for which there is an evidentiary foundation and which, if believed by the jury, would be legally sufficient to render the accused innocent,' this court presumes that the lower court has abused his discretion." *United States v. Correa-Ventura*, 6 F.3d 1070, 1076 (5th Cir. 1993)(quoting *United States v. Rubio*, 834 F.2d 442, 446 (5th Cir. 1987)). But this court has applied three different standards for what constitutes "an evidentiary foundation" requiring a self-defense instruction: (1) "any evidence" regardless of how insubstantial; (2) "substantial evidence" defined as "more than a scintilla"; and (3) "evidence sufficient for a reasonable jury to find in [the defendant's] favor" (the formulation adopted from *Mathews v. United States*, 485 U.S. 58, 108 S.Ct. 883, 99 L.Ed.2d 54 (1988)).

The "any evidence" standard has been applied in this circuit since the seminal cases *Perez v. United States*, 297 F.2d 12 (5th Cir. 1961), and *Strauss v. United States*, 376 F.2d 416 (5th Cir. 1967). Courts have continued to apply the "any evidence" standard both before and after the Supreme Court's decision in *Mathews*, on which the opinion relies.[1]

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[1] *See, e.g., United States v. Garcia*, 452 F.2d 419, 422-23 (5th Cir.1971), ("The test is whether there is some evidence to support the defense theory."); *United States v. Young*, 464 F.2d 160, 164 (5th Cir.1972) (defendant was "effectively deprived . . . of his right 'to have presented instructions relating to a theory of defense for which there is any foundation in the evidence.'"); *United States v. Taglione*, 546 F.2d 194 (5th Cir.1977) (citing *Strauss*, court stated, "Where the evidence

Other courts within the circuit have applied a slightly more demanding "more than a scintilla" test. *See Pierce v. United States*, 414 F.2d 163, 166-68 (5th Cir.), *cert. denied*, 396 U.S. 960, 90 S.Ct. 435, 24 L.Ed.2d 425 (1969); *United States v. Groessel*, 440 F.2d 602, 606 (5th Cir. 1971). But those courts that have recognized the existence of the two different standards--"any evidence" and "more than a scintilla"--have

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presents a theory of defense for which there is foundation in the evidence, refusal to charge on that defense is reversible error."); *United States v. Parker*, 566 F.2d 1304 (5th Cir.) ("In deciding this case we must look at the facts in the light most favorable to defendant, since defendant is entitled to jury instructions relating to a theory of defense for which there is any foundation in the evidence."), *cert. denied*, 435 U.S. 956, 98 S.Ct. 1589, 55 L.Ed.2d 808 (1978); *United States v. Goss*, 650 F.2d 1336, 1343 (5th Cir.1981) ("We have often held that, if there is any evidentiary support whatsoever for a legal defense, and the trial court's attention is specifically directed to that defense, the trial judge commits reversible error by refusing thus to charge the jury . . . . Because [the proposed defense] was an available defense, we must determine whether, construing the evidence most favorably to the defense, there was an underlying evidentiary foundation to support the [defendant's claim], regardless of how weak, inconsistent or dubious the evidence of [the defense] may have been."); *United States v. Washington*, 688 F.2d 953 (5th Cir. 1982) ("Indeed, an instruction specifically embracing the theory of the defense must be given even though the evidence underlying the defense be 'weak,' 'insufficient,' or 'dubious.'"); *United States v. Rubio*, 834 F.2d 442, 446 (5th Cir. 1987) ("'[I]f there is any evidentiary support whatsoever for a legal defense, and the trial court's attention is specifically directed to that defense, the trial judge commits reversible error by refusing to charge the jury.'") (quoting *United States v. Goss*, 650 F.2d 1336, 1344 (5th Cir.1981)); *United States v. Kim*, 884 F.2d 189, 193 (5th Cir.1989) ("A criminal defendant is entitled to have the jury instructed on a theory of the defense for which there is any foundation in the evidence."); *United States v. Cordova-Larios*, 907 F.2d 40, 42 (5th Cir.1990) ("A defendant is entitled to have the jury instructed on a theory of the defense for which there is any foundation in the evidence.").

found no outcome-determining difference between them. *See United States v. Andrew*, 666 F.2d 915, 922-24 nn. 10-11 (5th Cir. 1982); *United States v. Fischel*, 686 F.2d 1082, 1086 n. 2 (5th Cir. 1982); *United States v. Leon*, 679 F.2d 534, 539 n. 5 (5th Cir. 1982). *See also United States v. Hill*, 626 F.2d 1301, 1303-04 n. 3 (5th Cir. 1980) (noting that the semantic discrepancies between these two formulations have not produced disparate results in cases). Finally, there is *United States v. Stowell*, 953 F.2d 188, 189 (5th Cir.) (per curiam), *cert. denied*, 503 U.S. 908, 112 S.Ct. 1269, 117 L.Ed.2d 497, *and cert. denied*, 506 U.S. 902, 113 S.Ct. 292, 121 L.Ed.2d 217 (1992), which the court reads as explaining away the "any evidence" test based on a statement in *Mathews*, that "a defendant is entitled to an instruction as to any recognized defense for which there exists sufficient evidence for a reasonable jury to find in his favor." But *Mathews* seems to me a thin reed on which to lean that proposition.[2]

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[2] *Mathews* did not directly address the evidentiary standard under which a jury instruction must be given. The quoted statement was only a link in the Court's chain of reasoning, leading to a holding that a defendant is entitled to raise inconsistent defenses. *See Mathews*, 485 U.S. at 63, 108 S.Ct. at 886-87. But the case *Mathews* cites in support of the quoted statement, *Stevenson v. United States*, 162 U.S. 313, 16 S.Ct. 839, 40 L.Ed. 980 (1896), is instructive. *See Mathews*, 485 U.S. at 63, 108 S.Ct. at 886-87.

Stevenson involved a defendant who was charged with murder. The trial court refused to give a jury instruction on the lesser included offense of manslaughter and the defendant appealed this refusal. In deciding whether the trial court erred by failing to give the instruction, the Court stated:

> The evidence might appear to the court to be simply

Whatever formulation of the standard applies here, however, defendants are entitled to an instruction on self-defense. Even under the *Mathews/Stowell* standard, which is arguably the most demanding of the three, there need only be sufficient evidence in the record to permit a jury to have a reasonable doubt that defendants were not acting in self-defense; this is so because, while the defendant bears the burden of production on self-defense, the government retains the burden of persuasion to prove the absence of self-defense beyond a reasonable doubt. *See United States v. Alvarez*, 755 F.2d 830, 842-43 & n. 12 (11th Cir.) (setting out the burden of proof for self-defense under federal criminal law), *cert. denied*, 474 U.S. 905, 106 S.Ct. 274, 88 L.Ed.2d 235

> overwhelming to show that the killing was in fact murder, and not manslaughter or an act performed in self defense, and yet, so long as there was some evidence relevant to the issue of manslaughter, the credibility and force of such evidence must be for the jury, and cannot be matter of law for the decision of the court.
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> . . . A judge may be entirely satisfied from the whole evidence in the case that the person doing the killing was actuated by malice; that he was not in any such passion as to lower the grade of the crime from murder to manslaughter by reason of any absence of malice; and yet if there be any evidence fairly tending to bear upon the issue of manslaughter, it is the province of the jury to determine from all the evidence what the condition of mind was, and to say whether the crime was murder or manslaughter.

Stevenson, 162 U.S. at 314-15, 323, 16 S.Ct. at 839, 843 (emphasis added). *Stevenson* illuminates the meaning of *Mathews*, making clear that a defendant is entitled to a defense instruction so long as it is supported by any evidence.

(1985); *United States v. Johnson*, 542 F.2d 230, 233-34 n. 4 (5th Cir. 1976). *See also* Fifth Circuit Pattern Jury Instructions (Criminal Cases), No. 2.51 at 137-38 (1990 ed.). As the following discussion shows, I believe that there was ample evidence to permit a jury to have had a reasonable doubt that the defendants were not acting in self-defense.

B. *Sufficency of the Evidence*

At the outset it is necessary to recognize that this case is about the culpability of individual defendants. The crime of which each defendant was convicted--aiding and abetting the manslaughter of federal agents--was allegedly committed by each defendant individually; it was not a group crime. Contrary to the opinion's general approach, each defendant is entitled to individual consideration of the charges against him and his defenses. Specifically, each is entitled to individual determination of his right to a self-defense instruction. The court acknowledges as much when it holds that Castillo is not entitled to an instruction because of the evidence reflecting his conduct on the day of the gun battle,[3] but the court otherwise forsakes this approach.

The first issue is whether, treating each defendant individually, there is evidence in the record showing that *he* was the aggressor in the gun battle. The defense of self-

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[3] The factual basis for the court's conclusion omits the undisputed evidence, erroneously excluded by the district court, that Castillo took cover during the gun battle and never fired a shot. *See infra* pp. 5097-98.

defense is available only to one who is "not the aggressor." *See* Wayne R. LaFave & Austin W. Scott, Jr., *Criminal Law* § 53 (1972). If there were evidence that any of these defendants had provoked the shooting, that evidence might disqualify that defendant from claiming a self-defense instruction. But a defendant is not required to take the stand to deny his role as an aggressor.

Here, there is no evidence that any of the individual defendants provoked the shooting. While there is conflicting evidence as to whether the first shot came from within the compound or outside the compound, no evidence identifies any of the individual defendants as firing the first shot. In the absence of such evidence, the defendants were entitled to a self-defense instruction so long as there was enough evidence to permit a reasonable jury to have a reasonable doubt about whether the agents did not use excessive force.

The "first shot" evidence is, therefore, of limited significance. To the extent that evidence is relevant to whether any defendant was an aggressor, the court's treatment of it goes beyond the determination of its sufficiency and engages in impermissible weighing and evaluation of its credibility.[4] The opinion rejects Ballesteros'

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[4] While the court must determine whether the requisite amount of evidence has been produced to support the instruction sought, the court may not weigh the evidence and pass on its credibility. *See Pierce*, 414 F.2d at 166 ("[O]nce there is [sufficient evidence to raise the defense and justify its consideration], it is the function of the jury to weigh it, and the judge cannot refuse to submit the issue merely because he thinks that the defense has little merit."). *See also Stevenson*, 162 U.S. at 316, 16 S.Ct. at 840 ("If there were some appreciable evidence [to support the

testimony because it was contradicted at trial and Castillo's post-arrest statement as a "self-serving, post-arrest" statement contradicted by "overwhelming" testimony of agents and media representatives and by physical facts. The evidence the opinion describes, however, portrays a scene of great complexity and confusion. Deciding who shot first based on that evidence requires a difficult factual determination that should not be made by a court of appeals, but should have been left to a jury.

The heart of the matter is whether there was sufficient evidence to raise a reasonable doubt as to whether the agents used excessive force. The defendants contend that the evidence shows that agents fired indiscriminately through the windows and walls of rooms from which no gunfire originated. This contention was amply supported by the testimony of Kathryn Schroeder and Marjorie Thomas (summarized in the margin),[5] who were present in the

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instruction sought], its proper weight and credibility were for the jury."); *Strauss*, 376 F.2d at 419 ("If the trial judge evaluates or screens the evidence supporting a proposed defense, and upon such evaluation declines to charge on that defense, he dilutes the defendant's jury trial by removing the issue from the jury's consideration.").

[5] Kathryn Schroeder, a government witness, testified that on the morning of February 28, 1993, she was in her room with her children watching out the window. She testified that there were no firearms in her room at that time. (R. 4455.) While watching out the window, she saw uniformed men jump out of two cattle trucks and start running up the walk with rifles pointed and held about mid-way, meaning not all the way at their shoulders. (R. 4460-63.) She testified, "Then almost immediately, I heard shots." (R. 4462.) When she heard the shots, she got down on the floor. (R. 4463.) "Within another five or ten seconds," (R. 4463), or (another estimate) "about 15-20 seconds" after the initial

shot, (R. 4603), shots began coming into her room. According to Schroeder's testimony, bullets came through her window and walls, (R. 4602, 4663, 4665-66), from the top of the window to the bottom as well as through the corner of the window and wall, (R. 4603, 4464); about a half dozen shots came through the window, (R. 4464); and dogs were shot in front of her room, (R. 4602, 4665-66). She testified that after the onset of the gunfire she and her children got down on the floor and she had her children lie under the beds. (R. 4464.) According to her testimony, Schroeder never fired a shot during this time, (R. 4665-66), and no one else fired from her room either, (R. 4602-03). Schroeder testified that after she was on the floor she heard the gunfire going on and on. (R. 4465.) As the gunfire continued, she was able to tell which bullets were coming from outside and which were coming from inside. (R. 4465.) She feared for her life so she stayed on the floor. (R. 4602.) Eventually, Brad Branch came in and asked if they had a man and/or a gun in the room. When they said no, he said they had to get out because it was not safe there. (R. 4466.)

Similarly, Marjorie Thomas, also a government witness, testified (by video deposition) that, on the morning of the 28th, she went into her room and saw her friends looking out the window. (Transcript of redacted video deposition at pp. 28-29.) Thomas joined them at the window and saw three helicopters approaching. As the helicopters drew nearer, she heard a sound. Then bullets began coming through the window, shattering the blinds. (Tr. 30-31.) Thomas explained in her testimony that she saw the helicopter first and then heard a shot, (Tr. 181), but she did not know if the shot came from the helicopter. (Tr. 197.) She saw a man hanging from the helicopter, but could not tell if he was armed. (Tr. 200.) She just knew that the first shot she heard came from outside. (Tr. 181.) Thomas testified that the gunfire coming into the room shattered the window and left a bullet hole above the window near the ceiling. (Tr. 145.) She testified that when she saw the helicopter and heard the shots, she thought they were all in danger of being killed. (Tr. 87-88.) She and the other women dived to the floor to avoid the bullets flying overhead. (Tr. 30-31.) After they were on the floor, someone called up from the second floor to hand over their guns; three of the women in the room had guns present. (Tr. 32.) Thomas testified, however, that when the women were looking out the window before the gunfire started, they were not firing weapons or sticking anything out of the window. (Tr. 197.) When the person called up from

compound during the gun battle and were called at trial as government witnesses. The court rejects this evidence because it does not show that any of the *defendants* came under indiscriminate, unprovoked fire or knew that such fire was taking place. *See supra* p. 5099. That Schroeder and Thomas might have been entitled to a self-defense instruction had they been defendants, the opinion argues, does not vicariously entitle these defendants to such an instruction.

It is difficult to accept the opinion's contention that the testimony of Schroeder and Thomas provides no basis upon which a jury could infer that defendants knew of and were responding to excessive force. The opinion suggests that, before defendants could claim to be entitled to a self-defense instruction, Thomas or Schroeder had to tell them about the gun fire they witnessed. *See supra* p. 5102. However, there is substantial evidence, recited elsewhere in the opinion, that during the gun battle the defendants were present in the same area in which Schroeder and Thomas were located and that the latter were close enough to observe

the second floor asking for the guns, the women retrieved the guns from the floor, the bed, and beside the bed. They then passed the guns, along with ammunition vests, down to the lower floor. Thomas testified that she did not see who received the guns. (Tr. 33-34.) After passing the guns and ammunition to the lower floor, the women remained in the loft. Thereafter, someone called for them to come down to the second floor because it was not safe for them to be in the loft. At that time they all went to the second floor where Thomas saw many women and children on the floor close together, almost on top of each other. (Tr. 35.) Thomas testified that they remained on the ground during the shooting. Bullets were flying everywhere and they feared for their lives. Thomas testified that, during this time, she did not see anyone on the floor near her shooting out at the agents. (Tr. 116-19.)

the defendants' activities and hear their exclamations. *See supra* pp. 5116-18. If the evidence showed that the defendants were in the same general vicinity as Schroeder and Thomas while a battle involving helicopters and some 76 well-armed ATF agents raged in the compound, and ultimately resulting in over 30 casualties, surely that evidence was sufficient to raise an issue for the jury as to whether the defendants knew of and were responding to the random firing through walls and into windows observed by Schroeder and Thomas.

Finally, while we can all agree, as the opinion states, that a citizen may not initiate a firefight solely on the ground that the police sent too many well-armed officers to arrest him, it is too late in the day to argue that there are no limits on the amount of force the police may use in executing warrants. The Fourth Amendment protects individuals against "the use of excessive force by a law enforcement officer even when that officer is making a lawful arrest." *United States v. Span*, 970 F.2d 573, 577 n. 3 (9th Cir. 1992) (citing *Graham v. Conner*, 490 U.S. 386, 394-96, 109 S.Ct. 1865, 1870-72, 104 L.Ed.2d 443 (1989)). "[D]etermining whether force used to effect a particular seizure is 'reasonable' under the Fourth Amendment requires a careful balancing of 'the nature and quality of the intrusion on the individual's Fourth Amendment interests' against the countervailing governmental interests at stake." *Graham*, 490 U.S. at 396, 109 S.Ct. at 1871. The opinion declares that a "dynamic entry" by 76 agents armed with 9 millimeter pistols and AR-15 semiautomatic rifles and accompanied by helicopters will not support an inference of unreasonable

force. But under the court's sweeping rationale, it would have made no difference if the agents had been supported by armored personnel carriers, or by tanks, or by suppression fire from aircraft.

In conclusion, this appeal presents no mere "lawyer's sporting search for error" or for a "device for defendant to invoke the mercy-dispensing prerogative of the jury." *See supra* p. 5093. The trial judge gave a self-defense instruction in connection with the principal offense; while obviously not determinative, that shows that the person in the best position to evaluate the evidence regarded it as sufficient to warrant such an instruction. These defendants had a serious claim that the ATF used excessive force. Therefore, they were entitled to a self-defense instruction in relation to the manslaughter charge, and the trial court's failure to give one was reversible error.

II. *EXCLUSION OF A PORTION OF CASTILLO'S STATEMENT*

Texas Ranger De Los Santos testified that Castillo made the following statement about the day of the battle:

> That in the morning he heard someone saying that something was going to happen, so he got out of bed, put on his black clothing and an ammunition vest which held eight magazines, and picked up his AR-15. He then looked out the window and saw two cattle trailers approaching the compound. When he saw them he exited his room and went to the foyer

> where he saw Vernon Howell, Perry Jones, and others. Vernon Howell opened the front door and stated "Wait a minute, there's women and children in here." Then gunfire erupted through the door. When the gunfire erupted, he tried to chamber a round in his AR-15, but it jammed. He then ran down the hallway, back to his room, where he got his own personal 9-millimeter Baretta pistol. He exited his room and went down the hallway toward the other end of the compound to the second to the last room, facing the front of the compound. He entered that room, where there were three other Davidians.

Following this testimony, the prosecutor asked De Los Santos questions to clarify that the room Castillo entered faced the front of the compound. The clear inference to be drawn from this testimony is that, upon entering that room, Castillo participated in the gun battle, thereby aiding and abetting the manslaughter of federal agents.

The court barred Castillo from eliciting testimony from De Los Santos about the following portion of Castillo's statement:

> Castillo went into the room identified as McBean, Summers, and Hipsman's room. *Castillo stated he took cover during the shooting, never firing a shot.* Castillo also stated no one in his room fired a round. Castillo claims that he doesn't know who fired a weapon inside.

See supra p. 5108 (emphasis added). This excluded portion of Castillo's statement reveals the potentially misleading nature of the admitted portions of his statement.

Under the rule of completeness embodied in Fed.R.Evid. 106, additional portions of a defendant's statement must be admitted if they are "relevant to the issues [in the case]" and "*qualify or explain* the subject matter of the portion offered by the opponent . . . ." *United States v. Crosby*, 713 F.2d 1066, 1074 (5th Cir.), *cert. denied*, 464 U.S. 1001, 104 S.Ct. 506, 78 L.Ed.2d 696 (1983) (emphasis added).

Citing *United States v. Smith*, 794 F.2d 1333, 1335 (8th Cir.), *cert denied*, 479 U.S. 938, 107 S.Ct. 419, 93 L.Ed.2d 370 (1986), the court upholds the exclusion of this portion of the testimony because it leaves Castillo's "pick[ing] up his handgun . . . unqualified and unexplained." *See supra* p. 5110. *Smith*, however, is not analogous to this case but, in fact, reveals the weakness of the court's reasoning here.

In *Smith*, a police officer testified about a small portion of a defendant's post-arrest statement that he "was present on Hamilton Street at the time of [his co-defendant's] arrest and observed the arrest . . . [and] that he owned a red or maroon bicycle." *See Smith*, 794 F.2d at 1335. That statement served as a partial admission supporting the testimony of two government witnesses who placed the defendant in the vicinity of Hamilton Street at the time of his co-defendant's arrest. *Id.* Additional statements the

defendant sought to have admitted were: "(1) that [the defendant] had met [his co-defendant] two months earlier; (2) that five weeks before [the defendant's] arrest [his co-defendant] asked [the defendant] if he could dispose of Anheuser-Busch stock certificates; (3) that [the defendant] never dealt in stocks; (4) that stocks were a 'white boy's game'; and (5) that he was not involved in attempting to sell the stocks and had no idea what to do with stock certificates." None of these statements are related to the defendant's presence on Hamilton Street at the time of his co-defendant's arrest and, therefore, could not be said to qualify or explain the admitted portion of the statement. The only thing that could be said about the additional statements was that they were exculpatory. Thus, while *Smith* stands for the fact that the exculpatory nature of a statement does not *alone* require its admission under the Rule 106 fairness analysis, *Smith* does not speak to why Castillo's statement that he took cover in the room and did not fire his gun does not *qualify* the statement that he picked up a gun and went into the room facing the front of the compound (the side from which much of the Davidian gunfire came) and, therefore, should have been admitted.

Instead, *Smith* highlights the error in not admitting Castillo's additional statements. In *Smith*, the lower court affirmed the defendant's conviction, recognizing that the trial court had allowed "*Sutton to cross-examine the government agent with respect to the portion of the statement testified to*, [even though] it refused to allow Sutton to cross-examine . . . with respect to other portions [of his statement] . . . ." *Id.* at 1335-36 (emphasis added). When De Los Santos placed

Castillo armed in a room facing the front of the compound where the battle was taking place, Castillo surely was entitled to cross-examine him about that portion of the statement by asking what else he said about his presence in that room.

The opinion also cites *United States v. Haddad*, 10 F.3d 1252 (7th Cir. 1993), which is analogous to this case and supports the conclusion that the additional portion of Castillo's statement should have been admitted. In *Haddad*, a police officer testified that the defendant admitted that he knew there was marijuana under the bed. The trial court, however, excluded testimony that the defendant, at the same time, had denied knowledge of a gun that was found under the bed some six inches from the marijuana. The court held the ruling to be error, saying:

> The admission of the inculpatory portion only (i.e. that he knew of the location of the marijuana) might suggest, absent more, that the defendant also knew of the gun. The whole statement should be admitted in the interest of completeness and context, to avoid misleading inferences, and to help insure a fair and impartial understanding of the evidence.

10 F.3d at 1259 (ultimately holding that the error was not prejudicial because the same evidence was received through another witness).

Here, too, the receipt of the inculpatory portion of the statement (that Castillo went armed into a room facing the battle) required receipt of the other related portion of the statement (that he took cover and never fired a shot) to avoid

misleading inferences. *See, e.g., supra* p. 5114 (this court's statement that "Castillo admitted that he was in a room at the front, armed with a gun, during the gun battle.").

Castillo stood charged with murder. When De Los Santos' testimony placed Castillo where he might have fired a fatal shot, it was abuse of discretion to preclude cross-examination to show that he had taken cover and never fired a shot.

III. *SUFFICIENCY OF EVIDENCE OF CONSPIRACY UNDER § 924(c)(1)*

Defendants Branch, Whitecliff, Castillo, Avraam and Craddock were convicted under section 924(c)(1) and each was sentenced to 30 years. The predicate "crime of violence" on which this conviction was based was a conspiracy to murder federal officers. Because the jury acquitted the defendants on the conspiracy count, this court must determine whether there was sufficient evidence that each of the defendants joined the conspiracy with the requisite intent. *See United States v. Powell*, 469 U.S. 57, 67, 105 S.Ct. 471, 478, 83 L.Ed.2d 461 (1984); *United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir.), *cert. denied*, 510 U.S. 848, 114 S. Ct. 145, 126 L.Ed.2d 107 (1993).

Murder is "the unlawful killing of a human being with malice aforethought." 18 U.S.C. § 1111. As this court said in *United States v. Harrelson*, 754 F.2d 1153, 1173 (5th Cir.), *reh'g denied*, 766 F.2d 186, *cert. denied*, 474 U.S. 908, 106 S.Ct. 277, 88 L.Ed.2d 241, *and cert. denied*, 474 U.S.

1034, 106 S.Ct. 599, 88 L.Ed.2d 578 (1985), reversing a conviction:

> [Defendant] was charged . . . with conspiracy to commit first degree murder; first degree murder requires the criminal intent of premeditation and malice aforethought. It was therefore incumbent upon the government to prove [defendant] had that criminal intent . . . .

See also Ingram v. United States, 360 U.S. 672, 678, 79 S.Ct. 1314, 1319, 3 L.Ed.2d 1503 ("conspiracy to commit a particular substantive offense cannot exist without at least the degree of criminal intent necessary for the substantive offense itself."), *reh'g denied*, 361 U.S. 856, 80 S.Ct. 42, 4 L.Ed.2d 96 (1959); *United States v. Beil*, 577 F.2d 1313, 1314-15 (5th Cir.), *reh'g denied*, 585 F.2d 521 (5th Cir. 1978), *cert. denied*, 440 U.S. 946, 99 S.Ct. 1422, 59 L.Ed.2d 634 (1979). A leading text elaborates the point:

> At the outset, it is useful to note that there are really two intents required for the crime of conspiracy. Every conspiracy involves an agreement, so it must be established that the several parties intended to agree. But such an intent is "without moral content," and thus it is also necessary to determine what objective the parties intended to achieve by their agreement. Only if there is a common purpose to attain an objective covered by the law of conspiracy is there liability.

2 Wayne R. LaFave & Austin W. Scott, Jr., *Substantive Criminal Law* § 6.4(e)(1986).

The court states that "[t]he record is replete with evidence of a conspiracy to murder federal agents and each individual defendant's membership in that conspiracy." But the evidence as to these defendants relating to the events of February 28 reflects at most that each, as a member of the Branch Davidian sect, participated in some fashion in the gun battle. There is no evidence that any of them entered into an agreement to kill federal officers, much less that any did so with premeditation and malice aforethought. That these defendants were members of the sect led by David Koresh, whose teachings may well have been inflammatory, and that they were present in the compound during the battle and in various ways participants in it, does not support a finding that each of them conspired to murder federal officers.

Each defendant is entitled to individual justice by means of a review of the evidence to determine whether the requisite elements of such a conspiracy have been established as to him. Failing that, their conviction of the predicate offense rests on nothing more than guilt by association.

Accordingly, I would reverse the convictions and remand for a new trial.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 94-50437

UNITED STATES of AMERICA,
Plaintiff-Appellee,

versus

BRAD EUGENE BRANCH, ET AL.,
Defendant-Appellant.

Appeal from the United States District Court
For the Western District of Texas

[Filed September 25, 1996]

(Opinion *United States v. Branch*, 5 Cir., 1996, 91 F.3d 699)

Before HIGGINBOTHAM and DUHÉ, Circuit Judges, and SCHWARZER*, District Judge.

PER CURIAM:

We find that *United States v. Lucien*, 61 F.3d 366

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* District Judge of the Northern District of California, sitting by designation.

(5th Cir. 1995), does not control in this case. *Lucien* presented a factually different situation where instructional error in a predicate offense infected the conviction under 18 U.S.C. § 924(c)(1). The jury charge in *Lucien* failed to allow the jury to consider the lesser offense of possession, resulting in reversal of the predicate court. If in *Lucien* the found predicate offense had been possession of drugs as distinguished from distribution, the jury's view of the use of firearms found on the premises might have been quite different. Moreover, in *Lucien*, the government did not contest the reversal of the § 924(c)(1) conviction on the grounds that inconsistent verdicts may stand and therefore effectively conceded that point. We decline to interpret *Lucien* as changing the universally held view that inconsistent verdicts may stand. *United States v. Powell*, 469 U.S. 57 (1984). The remaining contentions are also without merit and are rejected. Judge Schwarzer adheres to his dissent.

Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in regular active service of this court have requested that the court be polled on rehearing en banc (Federal Rules of Appellate Procedure and Local Rule 35), the suggestion for rehearing En Banc is DENIED.

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	Criminal No.
	§	W-93-CR-046
BRAD EUGENE BRANCH (2),	§	
KEVIN WHITECLIFF (3),	§	
CLIVE DOYLE (4),	§	
JAMIE CASTILLO (5),	§	
LIVINGSTON FAGAN (6),	§	
PAUL GORDON FATTA (7),	§	
GRAEME LEONARD CRADDOCK (10),	§	
RENOS AVRAAM (11), and	§	
RUTH OTTMAN RIDDLE (12),	§	
Defendants	§	

SENTENCING FINDINGS AND OPINION

[Filed June 21, 1994]

On February 28, 1993, an American tragedy of epic proportions took place near the community of Elk in Central Texas. The following sets for the Court's findings, made by a preponderance of the evidence.

On, before, and after February 28, serious mistakes were made. Defense arguments at trial were that serious

mistakes in judgment, particularly whether to proceed with execution of the search warrant after the element of surprise had been lost, were made by some in leadership roles of the Bureau of Alcohol, Tobacco and Firearms. Those allegations are not before this Court in this case, and are not deemed relevant in determining issues now before the Court.

The mistakes made by the Defendants now before the Court, and their co-conspirators, however, were serious violations of federal criminal law, and resulted in the homicide of four young agents, the injury of numerous other agents, and the deaths of numerous residents of the building referred to during the trial as the "Compound."

These Defendants, and other adult Branch Davidians, engaged in a conspiracy to cause the deaths of federal agents. It was a part of the beliefs of the Branch Davidians, expressed and taught by their leader, that they must bring about a violent conflict with federal agents, thereby forcing the agents to use deadly force against them, and by dying in the ensuing battle to be "translated" immediately to Heaven.

To this end, immense preparations were made. Huge sums were fraudulently charged to many credit cards in order to acquire an armory that would rival that of the National Guard unit's; ammunition in an unbelievable quantity was acquired; para-military uniforms and gear were purchased and created by Davidian seamstresses; firearm training and fortification of the Compound took place; the leader preached sermons to motivate his "army"; and finally preparations for the ambush of February 28 were completed.

At about 9:00 a.m. on that fateful morning, as agents attempted to execute a lawful search warrant, the first shots were fired from inside the front door of the Compound,

wounding Agent Ballesteros in his hand. Immediately thereafter, countless shots were fired from many locations in different areas of the Compound, and a gun battle lasting approximately two and one-half hours ensued.

Thereafter, for 51 days these Defendants and their co-conspirators defied federal authority and refused to surrender. Finally, by a combination of suicide and murder inflicted by Davidian upon Davidian, all but a handful of the Davidians were killed.

Defendants Branch, Whitecliff, Castillo, Fagan, and Avraam, stand convicted of aiding and abetting in the voluntary manslaughter of four federal agents, and in using or carrying a firearm during the commission of an act of violence. Defendant Craddock stands convicted of possession of an unregistered grenade and in using or carrying a firearm during the commission of an act of violence. Defendant Riddle stands convicted of using or carrying a firearm during the commission of an act of violence. Defendant Fatta stands convicted of two counts of possessing illegal firearms.

The primary issue to be determined is whether the mandatory consecutive sentence to be applied to the "using or carrying" count is five years or 30 years. No previous decision deciding this issue can be located by the Court or by counsel. Both the Defendants and the Government have offered able briefs to aid the Court in this determination. The task faced is to determine what answer the Fifth Circuit Court of Appeals would give, in the first instance and the Supreme Court, if it elects to answer, in the second instance. This Court must decide this legal issue without being influenced by the result that will be mandated, and then apply the Sentence Guidelines.

The first question to be answered is whether the Defendants can be charged with using or carrying an enhanced weapon. Obviously, Graeme Craddock was convicted of possessing an explosive device. The others, however, were not, but there was credible evidence that Riddle and Castillo actually possessed an enhanced weapon. (There is no evidence that any short-barrelled firearms were possessed).

By its verdict convicting the Defendants of violating Section 924(c)(1), the jury found that they were members of a conspiracy to murder federal agents and that they used or carried a firearm during and in relation to this crime of violence. To determine the appropriate sentence to impose, it is incumbent upon the Court to determine the facts as to the type of firearm or destructive device used or carried by the Defendants by a preponderance of the evidence. *McMillan v. Pennsylvania*, 477 U.S. at 91; *United States* v. *Casto* 889 F.2d 562, 570 (5th Cir.); *cert. denied*, __ U.S. _ , 110 S.Ct. 1164 (1989). Under the statute, the term "used" is not confined to situations where a court must find actual or constructive possession. *United States v. Long*, 905 F.2d 1572, 1576 & n. 6 (D.C. Cir.) ("use" is properly susceptible of a broader interpretation than "carry"), *cert. denied*, ____ U.S. ____, 111 S.Ct. 365 (1990); *United States v. Edun*, 890 F.2d 983, 987 (7th Cir. 1989).

In its most widely understood application, the terms "used" or "uses" embrace the discharge of, assault with, or brandishing of a firearm during the commission of a felony or to avoid subsequent arrest. *See, e.g., Busic v. United States*, 446 U.S. 398 (1980) (attempted robbery at gunpoint and discharging pistol in battle with DEA agents); *United States v. Molina-Uribe*, 853 F.2d 1193 (5th Cir. 1988)(killing undercover DEA agent with his own weapon during drug

buy), *cert. denied*, 489 U.S. 1022 (1989); *United States v. Alvarez*, 775 F.2d 830 (11th Cir.) (killing one undercover ATF agent and wounding another during drug transaction), *cert. denied*, 474 U.S. 905 (1985); *United States v. Chilcote*, 724 F.2d 1498, 1505 (11th Cir.)(pointing pistol at DEA agent attempting to effect arrest), *cert. denied*, 467 U.S. 1218 (1984). The courts have, however, repeatedly held that "a defendant can use a firearm within the meaning of § 924(c)(1) without firing, brandishing or displaying it." *United States v. Ross*, 920 F.2d at 1536, quoting *United States v. McKinnell*, 888 F.2d 660, 674-75 (10th Cir. 1989); *United States v. Thomas*, 12 F.3d 1350, 1361-62 (5th Cir. 1993) (firearm found in a zippered bag in second floor closet) *see e.g., United States v. Brown*, 915 F.2d 219, 225 (6th Cir. 1990); *United States v. Lyman*, 892 F.2d 751, 753 (8th Cir. 1989) (quoting legislative history), *cert. denied*, __ _ U.S. ____, 111 S.Ct. 45 (1990); *United States v. Rosado*, 866 F.2d 967, 969 (7th Cir.), *cert. denied* ___ U.S. ___, 110 S.Ct. 117 (1989).

In fact, where firearms are not found on the person of the defendant, but are found on the premises "readily available in strategic locations," the courts has applied the "fortress theory" in sustaining convictions and sentences for violations of Section 924(c)(1). *United States v. Wilson*, 884 F.2d 174, 177 (5th Cir. 1989) (where predicate offense was a drug violation); *United States v. Robinson*, 857 F.2d 1006, 1010 (5th Cir. 1988) (same); see *United Sates v. Matra*, 841 F.2d 837, 843 (8th Cir. 1988) (same). In the above cases, the evidence established that the firearms were intended to protect drugs or otherwise facilitate drug transactions, and accordingly, the firearms were considered to have been used by the defendant(s) "during and in relation to" the underlying drug trafficking crime.

In *Matra*, the defendant argued that the language of § 924(c)(1) precluded conviction unless the United States established that the defendant actually possessed weapons during the drug transaction. In rejecting such a narrow interpretation of § 924(c)(1) the Court of Appeals for the Eighth Circuit used a military analogy to support its holding. As the Court noted, military installations keep weapons readily available to defend against potential enemy attack; so, too, may weapons be kept readily to protect a drug house, thereby safeguarding and facilitating illegal drug transactions. Matra's house was described as a veritable fortress, having only one usable entrance, which easily could be guarded from a second-story window. The court found that although Matra did not have actual possession of the machinegun or the other firearms, he did have ready access to them. Even though Matra did not brandish or discharge a weapon, the court concluded that the weapons were an integral part of his criminal undertaking and their availability increased the likelihood that the criminal undertaking would succeed. In the court's view, it would defy logic and common sense to conclude Matra did not "use" the machinegun within the meaning of § 924(c)(1) during and in relation to his underlying offense.

Such reasoning would clearly be applicable to the facts in this case. The evidence established the existence of not only a figurative but a literal fortress, manned by each of the Defendants convicted on this court. Each either had actual or constrictive possession of the numerous fully automatic weapons and hand grenades present in the Compound before February 28, 1993 and through the 51 day siege.

The Court heard the evidence at trial and recalls that from the ashes throughout the Compound and the vehicles

immediately around it, 48 machineguns were found -- 46 complete firearms and 2 modified lower receivers. An examination of these and other weapons found at the Compound and admitted into evidence establishes that many of these weapons were equipped with silencers. Additionally, four live hand grenades -- destructive devices under Section 924(c) -- and numerous exploded fragments were discovered in the search of the Compound after the fire. The testimony established that all of these Defendants stood guard, with order to fire should the FBI agents attempt entry, and that guns were available at each guard position. Numerous witnesses testified to the use of automatic weapons during the February 28th firefight with ATF agents and that was corroborated by the identification by Special Agent James Cadigan, a firearms expert, of fully automatic weapon fire on the video recordings made on that date.

The fortress theory demonstrates by analogy that when evaluating whether a firearm was carried in relation to an offense, a defendant's intentions as he engaged in the precise conduct that comprised the predicate offense should not be the sole focus. *United States v. Brown*, 915 F.2d 219, 224-25 (6th Cir. 1990). Rather, the totality of circumstances surrounding the commission of the crime must be examined: "the emboldened sallying forth, the execution of the transaction, the escape, and the likely response to contingencies that might have arisen during the commission of the crime." *Brown*, 915 F.2d at 226. In fortress type cases, the sheer volume of weapons makes reasonable the inference that the weapons involved were carried in relation to the predicate offense since they increase the likelihood that the offense will succeed. *Wilson*, 884 F.2d at 177.

Additionally, a defendant may be convicted of a violation of § 924(c)(1) under the doctrine of *Pinkerton v.*

United States, 328 U.S. 640 (1946), where a co-conspirator carried a firearm in furtherance of the criminal scheme and that action was reasonably foreseeable. *United States v. Elwood*, 993 F.2d 1146, 1151 (5th Cir. 1993)(defendant convicted of Section 924(c) violation where his codefendant carried the weapon). *United States v. Capote-Capote*, 946 F.2d 1100, 1104 (5th Cir. 1991) (defendant found to have possessed machinegun even though not present in area where it was found.) *See United States v. Johnson*, 886 F.2d 1120, 1123 (9th Cir. 1989), *cert. denied*, 494 U.S. 1989 (1990); *United States v. Golter*, 880 F.2d 91, 93-94 (8th Cir. 1989); *United States v. Gironda*, 758 F.2d 1201, 1214 (7th Cir.), *cert. denied*, 474 U.S. 1004 (1985); see also *United States v. Cummings*, 937 F.2d 941, 944 (4th Cir.) (collecting cases), *cert. denied*, ___ U.S. ___, 112 S.Ct. 395 (1991).

The evidence at trial established and the Court finds that Defendants Ruth Riddle and Renos Avraam had actual possession of a machinegun between February 28th and April 19th and that Graeme Craddock had actual possession of a destructive device on April 19th. It was further established that the weapons were displayed openly at the "chapel" and actually issued to members with all the "congregation" present. Weapons and violent confrontation were an integral part of the Message, and they were actually used to confront and repel law enforcement agents on February 28th and April 19th. Consequently, all of the Defendants convicted on Count Three should be held accountable under *Pinkerton* for using and carrying machineguns, destructive devices and silencers during their conspiracy to murder federal officers.

Next, the jury, by convicting on Counts Three, Seven, Nine and Ten, found that some of the Defendants used or carried 30-year enhanced weapons during the period of the conspiracy, and the Court concurs.

As already mentioned, there were numerous machine guns, hand grenades and silencers found in the ashes of the Compound; an expert witness clearly identified automatic weapon fire from the video tape admitted in evidence; and the agents on the scene corroborated these facts.

Finally, it is clear that the use of fully automatic weapons, and probably grenades and silencers, was foreseeable and foreseen by all of the Defendants, who were taught, who planned, and who practiced for just such an outcome.

Accordingly, the Court finds that those Defendants did, for sentencing purposes, use and carry such enhanced weapons.

Second question is whether the portion of § 924(c)(1) that refers to enhanced weapons is an enhancement provision or a separate offense. The statute is as follows (for a first-time offender of this section):

> (c)(1) Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short barreled shotgun to imprisonment for ten years and if the firearm is a machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to

imprisonment for thirty years. . .

The Defendants primarily rely on *United States v. Correa-Ventura*, 6 F.3d 1070 (5th Cir. 1993) and in particular footnote 35, which states:

> We do note (without deciding) that a different situation may be presented when the evidence tends to prove the use of more than one weapon, and the firearms proven fall within different classes of Section 924(c)'s proscribed weapons. For example, if a firearm violation is asserted, and evidence is introduced as to both shotguns and rifles (with a mandatory 5-year imprisonment penalty) and revolvers with silencing equipment (resulting in a 30-year imprisonment), the jury may well be required to agree on which type of weapon was used in order for the court to assess the appropriate penalty. In that instance, a unanimity instruction as to the class of weapon may be necessary, since the legislature, in amending Section 924(c) to provide varying penalties for certain classified firearms, appears to have indicated its intent that a unanimous verdict be reached with respect to the given class of firearms. *United States v. Sims*, 975 F.2d 1225, 1235-36 (6th Cir. 1992), *cert. denied*, ____ U.S. ____, 113 S.Ct. 1315, 122 L.Ed.2d 702 (1993).

It is argued that it is simply contrary to fair play for there to be no requirement that a jury determine whether the weapon used or carried was an enhanced one, especially when the punishment increases from 5 years to 30 years. Title 21, section 841 however, contains enhancing provisions based on the quantity of controlled substances involved, and the quantity can increase the sentence to a mandatory

minimum of 20 years or a mandatory life sentence if a death or serious bodily injury occurs or if the defendant has two previous convictions under that section. These provisions are clearly sentence enhancing provisions, and are as profound in their impact as is 924(c)(1). *United States v. Royal*, 972 F.2d 643 (5th Cir. 1992).

It should be pointed out that § 924(c)(1) (the entire statute) does define a separate crime and is not merely an enhancement provision. *United States v. Correa-Ventura*, 6 F.3d 1070, 1083 n.22 (5th Cir. 1993). That premise was the basis of this Court's Order validating Count Three despite the absence of a guilty finding on Count One. Section 924(c)'s dependence upon an underlying crime (in most cases), however, "contributes to the appearance that it is akin to a penalty enhancement provision." *Correa-Ventura* at 1083.

The Supreme Court recently set forth the elements of an offense under 18 U.S.C. § 924(c)(1):

> Section 924(c)(1) requires the imposition of specified penalties if the defendant, 'during and in relation to any crime of violence or drug trafficking crime[,] uses or carries a firearm.' By its terms, the statute requires the prosection to make two showings. First, the prosecution must demonstrate that the defendant 'use[d] or carrie[d] a firearm.' Second, it must prove that the use or carrying was 'during and in relation to' a 'crime of violence of drug trafficking crime.'

Smith v. United States, 113 S.Ct. 2050, 2053 (1993).

Under the plain language of the statute, and the Supreme Court's determination of the elements, the type of weapon is

not an element of the offense.[1] Because *Smith* involved a machinegun, the Supreme Court could have incorporated the type of firearm as an element of the offense, but did not do so. The Supreme Court just stated that the sentence for this offense is five years, "[a]nd where, as here, the firearm is a 'machinegun' or is fitted with a silencer, the sentence is 30 years." *Smith* at 2053.

As recently as March 10, 1994, the Fifth Circuit accepted this two part test enunciated by the Supreme Court, and noted that *only* those two elements are required. *United States v. Singleton*, 16 F.3d 1419, 1423 (5th Cir. 1994) (citing Smith).

It is axiomatic that a legislature may establish various factors which, should the sentencing court find to exist, subject a defendant convicted under the statute to a minimum mandatory sentence, and there is no constitutional requirement that these sentencing enhancing factors be submitted to a jury.

For example, in *United States v. Royal*, 972 F.2d 643 (5th Cir. 1992), the defendant was charged and convicted by a jury in this Court of violating 21 U.S.C. §§ 841(a)(1) & 846. The indictment did not charge a specific drug amount, and the jury was not instructed or questioned as to amount. The proof at sentencing established that the defendant had trafficked more than five kilograms of cocaine, thus implicating a mandatory minimum sentence of ten years.

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[1] It should be noted, however, that because the defendant in *Smith* was actually indicted for and convicted of using or carrying a machinegun during a drug trafficking crime, the particular issue facing this Court was not presented. The indictment alleged that the defendant "knowingly used the MAC-10 and its silencer during and in relation to a drug trafficking crime." *Smith* at 2053.

The defendant was sentenced to 30 years incarceration.

On appeal, the defendant argued that this Court erred in enhancing his sentence because the government failed to indict him for the quantity of drugs implicating the enhancement (i.e., over five kilograms). The government had filed a Penalty Enhancement Information several days after the jury's verdict and several months before sentencing. The Fifth Circuit affirmed the conviction:

> This circuit is part of an overwhelming majority of courts which have concluded that quantity is not an element of the offense. [citations omitted] Rather, quantity is relevant only at sentencing under § 841(b). Royal does not allege that the indictment did not adequately notify him of the charges against him. Because quantity is not an element of the offense of which he was convicted, he was not entitled to be notified through the indictment that quantity would be relevant to his sentencing. The notice he received [by the government's Penalty Enhancement Information and the Presentence Report] that the court would take quantity into account when sentencing him was sufficient to allow him to present evidence, if any, disputing the government's evidence concerning quantity.

Royal at 650.

This Court's holding is further supported by *McMillan v. Pennsylvania*, 477 U.S. 79 (1986). In *McMillan* the Supreme Court upheld a Pennsylvania statute which provided that anyone convicted of certain enumerated felonies was subject to a mandatory minimum sentence of five years if the sentencing judge finds, by a preponderance of the evidence,

that the person "visibly possessed a firearm" during the commission of the offense. *McMillan* at 81. The Supreme Court rejected the defendant's argument that the state must prove visible possession beyond a reasonable doubt, and held the Pennsylvania scheme to be consistent with due process. The Supreme Court noted, however, that it was unable to lay down a bright line test, and differences of degree might mandate difference results in other cases.

To determine whether a particular statute (or part of a statute) creates an independent federal offense or is merely a sentencing-enhancement provision is a matter of legislative intent. *United States v. Jackson*, 891 F.2d 1151, 1152 (5th Cir. 1989). The factors deemed helpful, but not controlling, in making such a determination are whether: (1) punishment is predicated upon conviction under another section; (2) the statute multiplies the penalty received under another section; (3) the statute provides guidelines for sentencing hearings; and (4) the statute is titled as a sentencing provision. *United States v. Affleck*, 861 F.2d 97, 98 (5th Cir. 1988), *cert. denied*, 109 S.Ct. 1325 (1989).

The application of these factors to the sentencing portion of § 924(c)(1) clearly demonstrates Congressional intent to make the punishment provisions enhancement factors rather than essential elements. While punishment is not predicted upon a conviction for another offense, *United States v. Munoz-Fabela*, 896 F.2d 908, 909 (5th Cir.), *cert. denied*, 498 U.S. 824 (1990), it is clear that the statute does require a finding by the jury of the commission of another offense. *United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir.), *cert. denied* 114 S.Ct. 145 (1993). The very language of the statute makes it clear that it does multiply the punishment and that punishment is mandatory and to be imposed consecutive to any sentence. Last, the unchanged title of §

924, "Penalties," is an indication that Congress intended the enhancement factors to be just that, and not essential elements.

Finally, in *United States v. Harris*, 959 F.2d 246 (D.C. Cir. 1992), the District of Columbia Circuit held that the jury need not find that a defendant knew he possessed a machinegun for purposes of a conviction under § 924(c).[2] The D.C. Circuit "easily reject[ed]" the defendant's argument that a particularized scienter is required under § 924(c) "because there is no requirement that every element of an offense dealing with highly dangerous devices or substances have scienter." *Harris* at 258. The Court held:

> [W]e assume that section 924(c) is violated only if the government proves that the defendant . . . intentionally used firearms in the commission of a drug trafficking crime. The defendant's knowledge that the objects used to facilitate the crime are 'firearms' must be proven and charged to the jury, as it was in this case. Deliberate culpable conduct is therefore required as to the essential elements of the crime--the commission of the predicate offense and the use of a firearm in its execution--before the sentence enhancement for use of a machinegun arises.
>
> Harris and Smith argue, however, that in light of the enhanced penalties involved, if a machinegun was used the government must show that the defendant knew the precise nature of the weapon and not merely that he knowingly used a weapon in relation to a drug

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[2] The court did find that scienter was required for violation of 26 U.S.C. § 5845(a)(6) -- just as the Supreme Court has recently found for § 5861. *Staples v. United States*, 1994 U.S. Lexis 3773 (May 24, 1994).

distribution offense. The difficulty we see in appellants' position is that, assuming that the essential elements of the crime (drug trafficking and use of a firearm) already require a showing of *mens rea*, there does not seem to be a significant difference in *mens rea* between a defendant who commits a drug crime using a pistol and one who commits the same crime using a machinegun; the act is different, but the mental state is equally blameworthy. We are in neither case confronted with an altar boy making an innocent mistake. This case is similar to those involving arguments that criminal penalties cannot be enhanced based on possession of different kinds of illegal substances (drugs) without the government showing that the defendant knew the exact nature of a given illegal substance. That argument, correctly in our view, has been rejected by other circuits. . . . The jury found (pursuant to the district court's instructions) that both Harris and Smith knowingly or intentionally possessed a firearm, and that they did so intentionally to facilitate a drug trafficking crime. . . . We, therefore, conclude that appellants had the requisite *mens rea* under section 924(c).

Harris at 258-59.

In an earlier era, before the surge of crime in this country caused Congress to attempt to micro-manage sentences handed down by federal courts, judges could actually weight relative culpability and exercise discretion in formulating appropriate sentences. Such is not now the case. Based on this Court's review and analysis of all available authorities, it is determined that 30 year sentences as to all Defendants convicted of Count Three is mandatory.

Obstruction of Justice. U.S.S.G. §3C1.1.

Many of the Defendants object to the recommendation that two points be added to the offense level for obstruction of justice.

U.S.S.G. § 3C1.1, Application Note 3.i. provides that conduct prohibited by 18 U.S.C. §§ 1510-1516 is an example of conduct to which this enhancement applies.

Title 18 § 1509 provides:

> Whoever, by threats or force, willfully prevents, obstructs, impedes, or interferes with or willfully attempts to prevent, obstruct, impede or interfere with, the due exercise of rights or the performance of duties under any order . . . of a court of the United States shall be fined not more than $1,000.00 or imprisoned not more than one year or both.

* * *

It is clear that each of the Defendants, for 51 days, conspired to prevent lawful authorities from executing a lawful search warrant and did so by threat of force, specifically keeping lawful authorities at bay by use of firearms. This enhancement does apply, and the objections are overruled.

Official Victim Adjustment U.S.S.G. 3A1.2

Several defendants object to a three level increase in the offense level under the Official Victim provision of U.S.S.G. 3A1.2. That section provides:

If ---

a) * * *

b) during the course of the offense . . . the defendant or a person for whose conduct the defendant is otherwise accountable, knowing or having reasonable cause to believe that a person was a law enforcement or corrections officer, assaulted such officer in a manner creating a substantial risk of serious bodily injury, increase by 3 levels.

Each Defendant save Fatta was convicted of Count Three, which required a finding of conspiracy to murder federal agents. Such conspiracy and the ambush which resulted certainly constitutes an assault of the type described. There is no question that the Defendants knew the victims were law enforcement officers. Indeed the conspiracy demanded that they be. This objection is overruled.

Count Three Concurrent or Consecutive

Many Defendants suggest that punishment for Count Three should not be consecutive because the jury did not convict on the predicate Count One. This suggestion ignores the requirement that the jury find as to Count Three that the predicate offense occurred, even though "through mistake, compromise or lenity" it chose not to do so as to Count One. *United States v. Powell*, 469 U.S. 57 (1984).

Additionally, the second sentence of Title 18 U.S.C. § 924(c)(1) provides:

Notwithstanding any other provision of law,

the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with *any other term of imprisonment* including that imposed for the crime of violence . . . in which the firearm was used or carried. (emphasis supplied).

This objection is likewise overruled.

Acceptance of Responsibility U.S.S.G.. 3E1.1

All Defendants seek a three point reduction in the offense level for acceptance of responsibility. No defendant now before the Court admitted guilt, expressed remorse or in even any small way attempted to meet the requirements of this section. These objections are ludicrous and are overruled.

Fatta's Objections

Defendant Fatta suggests that adding 6 points for involvement of fifty or more firearms is inappropriate since they were only 48 illegal machineguns accounted for. Under Application Note 1, however, "firearm" includes any destructive device or silencer. There were several of each, and added to the 48 machineguns, the total exceeds 50. This objection is overruled.

Fatta also objects to a 2 point addition for the involvement of a destructive device. Since there were enough silencers to make the total above 50 without counting the live grenades, then adding this two points does not

double-count the grenades, and this object is also overruled.

Fatta's primary objection is the cross-reference to conspiracy to murder.

U.S.S.G. § 2K2.1(c) provides:

Cross-Reference

> 1) If the Defendant used or possessed any firearm or ammunition in connection with the commission or attempted commission of another offense, or possessed or transferred a firearm . . . with knowledge or intent that it would be used or possessed in connection with another offense, apply--
>
> (A) § 2X1.1 (Attempt, Solicitation or Conspiracy) in respect to that other offense, if the resulting offense level is greater than that determined above; . . .

§ 2X1.1 provides:

> (a) Base Offense Level: The base offense level from the guidelines for the substantive offense, plus any adjustments from such guideline for any intended offense conduct that can be established with responsible certainty.

The offense to which cross-reference would be applied is conspiracy to murder federal agents, an offense for which Fatta was acquitted. Fatta's argument is that by allowing cross-reference to that offense, the sentencing guidelines stands the law on its head. The first answer is

that the guidelines, and the cross-referencing provisions, merely directs the Court to the correct sentence within the statutory range. In this case, that command would direct the Court to the upper limits of the statutory range. The second answer is simply that that is the law.

The Second Circuit addressed this exact issue in *United States v. Concepcion*, 983 F.2d 369 (2d Cir. 1992), *cert. denied* in *Frias v. United States*, __ U.S. __, 114 S.Ct. 163 (1993). In that case, the defendant was acquitted of an underlying narcotics conspiracy, but convicted of possession of a firearm by a felon and possession of an unregistered firearm. The district court cross-referenced to conspiracy, the acquitted offense. In pertinent part, the Second Circuit held:

> Given the Commission's evident intent that the term 'another offense' include uncharged offenses, we are left with the question of whether it also meant that term to include an offense with which the defendant was charged but of which he was acquitted. We conclude that it did. . . . Since an '[a]quittal d[id] not have the effect of conclusively establishing the untruth of all the evidence introduced against [a] defendant,' [citation omitted], and since disputed facts for purposes of sentencing needed only be established by a preponderance of the evidence, the sentencing court was entitled to consider information that the defendant had engaged in conduct that was the subject of an acquittal. [citations omitted]

Concepcion at 387-88.

In *United States v. Masters*, 978 F.2d 281 (7th Cir. 1992), *cert. denied*, ___ U.S. ___, ___ S.Ct. ___, 124 L.Ed 2d 245 (1993), the Seventh Circuit similarly held, noting that

judges may take other crimes into account when sentencing even when the defendant has been acquitted of those crimes: "An acquittal means that the charge was not proven beyond a reasonable doubt; it does not mean that the defendant didn't do it." *Masters* at 286.

Therefore, the acquittal of Fatta on Count One does not preclude the cross-reference recommended by the probation office in this case. Moreover, even if the increase in this case could be considered "astronomical," as in the *Concepcion* case, this Court does not believe a downward departure pursuant to § 5K2.0 is appropriate. Fatta was convicted by the jury of Conspiracy to Possess Machineguns (Count 9) in violation of 18 U.S.C. § 922(o), and Aiding and Abetting in the Unlawful Possession of Machineguns (Count 10) in violation of 18 U.S.C. § 922(o) and 18 U.S.C. § 2. Because of the large number of automatic weapons and destructive devices in this case, the cross-reference is particularly appropriate and a downward departure is not warranted.

It is also important that U.S.S.G. 1B1.3, dealing with relevant conduct, provides:

> (a) Chapters Two (offense conduct) and Three (adjustments). Unless otherwise specified, . . . (iii) cross-reference in Chapter Two . . . shall be determined on the basis of the following:
>
> (1) . . .
>
> (B) in the case of jointly undertaken criminal activity . . . all reasonably foreseeable acts and omissions of others in furtherance of the jointly undertaken criminal activity,

> that occurred during the commission of the offense of conviction, in preparation for that offense, or in the course of attempting to avoid detection or responsibility for that offense. . . .

Lastly, Fatta was convicted of conspiracy to manufacture illegal arms, and under the circumstances, it was foreseeable and foreseen by him that those weapons would be used in the manner they were. Therefore, the cross-reference in this case is clearly appropriate, and Fatta's objection is overruled.

SIGNED this 17th day of June, 1994.

/s/
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D. C. 20543

April 21, 1997

Mr. Stephen P. Halbrook
10560 Main Street
Suite 404
Fairfax, VA 22030

Re: Jaime Castillo v. United States
No. 96-989
Kevin a. Whitecliff v. United States
No. 96-1028
Brad Eugene Branch, Renos Lenny Avraam, and
Graeme Leonard Craddock v. United States
No. 96-7227
Paul Gordon Fatta v. United States
No. 96-7265

Dear Mr. Halbrook:

The Court today entered the following order in each of the above entitled cases:

The petitions for writs of certiorari are denied.

Sincerely,
/s/
William K. Suter, Clerk

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT

U.S. COURT OF APPEALS
No. 97-50708 **F I L E D**
JUN 22 1999
CHARLES R. FULBRUGE III
CLERK

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JAIME CASTILLO; BRAD EUGENE BRANCH; RENOS LENNY AVRAAM; GRAEME LEONARD CRADDOCK; KEVIN A. WHITECLIFF,

Defendants-Appellants.

Appeals from the United States District Court
For the Western District of Texas

Before EMILIO M. GARZA, DeMOSS, and PARKER, Circuit Judges.
EMILIO M. GARZA, Circuit Judge:

Jaime Castillo, Brad Eugene Branch, Renos Lenny Avraam, Graeme Leonard Craddock, and Kevin A. Whitecliff ("the defendants") appeal their convictions and sentences under 18 U.S.C. § 924(c)(1). We affirm.

I

The defendants are Branch Davidians convicted for, among other things, violating 18 U.S.C. § 924(c)(1) because of their involvement in the events that occurred at the Mount Carmel compound near Waco, Texas, in early 1993.[1] At the time of the defendants' conviction, § 924(c)(1) stated:

> Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime or drug trafficking crime, be sentenced to imprisonment for

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[1] For a description of the events that occurred at the Mount Carmel compound in early 1993, see *United States v. Branch*, 91 F.3d 699, 709-10 (5th Cir. 1996), *cert. denied*, 520 U.S. 1185, 117 S. Ct. 1466-67, 137 L. Ed. 2d 681 (1997).

> five years, . . . and if the firearm is a machinegun, or a destructive device [*e.g.*, a hand grenade], or is equipped with a firearm silencer or muffler, to imprisonment for thirty years.

- 18 U.S.C. § 924(c)(1) (1994) (superseded).

Pursuant to § 924(c)(1), the district court sentenced Castillo, Branch, Avraam, and Whitecliff to thirty years imprisonment and Craddock to ten years imprisonment.[2] Underlying the sentences were findings of fact that the defendants had actually or constructively possessed enhancing weapons (*i.e.*, machine guns; destructive devices; firearms equipped with silencers or mufflers) during and in relation to a crime of violence that is, a conspiracy to murder federal agents. With the exception of Avraam, Craddock, and another co-defendant, Ruth Riddle, the district court did not base its findings of fact on direct evidence of actual possession. Rather, it attributed the possession of enhancing weapons specifically, machine guns, hand grenades, and firearms equipped with silencers to the defendants based on the "fortress theory"[3] and the *Pinkerton* doctrine.[4]

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[2] In the case of Craddock, the district court found that he was subject to a thirty-year sentence pursuant to § 924(c)(1), and then adjusted his sentence downward to ten years pursuant to § 5K2.16 of the Sentencing Guidelines, which allows for a downward departure when the defendant voluntarily discloses to authorities the existence of the offense and accepts responsibility for the offense prior to the discovery of the offense, if the offense was unlikely to have been discovered otherwise. *See* USSG § 5K2.16 (1993).

[3] The "fortress theory" provides that a defendant may be convicted under § 924(c)(1) "where large numbers of firearms were readily available in strategic locations near large quantities of drugs and money." *United States v. Wilson*, 884 F.2d 174, 177 (5th Cir. 1989).

[4] The *Pinkerton* doctrine, which finds its roots in *Pinkerton v. United States*, 328 U.S. 640, 66 S. Ct. 1180, 90 L. Ed. 1489 (1946), provides that "[a] party to a continuing conspiracy may be responsible for a substantive offense committed by a coconspirator pursuant to and in furtherance of the conspiracy, even if that party does not participate in the substantive offense or have any knowledge of it." *United States v. Elwood*, 993 F.2d 1146, 1151 (5th Cir. 1993) (quotations omitted) (describing the *Pinkerton* doctrine).

The defendants appealed. We affirmed on all issues but the sentences for the § 924(c)(1) convictions. *See United States v. Branch*, 91 F.3d 699, 745 (5th Cir. 1996), *cert. denied*, 520 U.S. 1186, 117 S. Ct. 1466-67, 137 L. Ed. 2d 681 (1997). In regard to the sentences, we noted that *Bailey v. United States*, 516 U.S. 137, 146-50, 116 S. Ct. 501, 507-09, 133 L. Ed. 2d 472, ___ (1995), establishes that, in the context of § 924(c)(1), "use" means "active employment,"[5] and held that the district court's finding of use based on evidence of actual or constructive possession did not meet *Bailey's* definition of "use." *See Branch*, 91 F.3d at 740. At the end of our discussion, we stated:

> As we have explained, there is evidence from which it could be found that machine-guns and other enhancing weapons [*e.g.*, destructive devices, firearms equipped with firearm silencers] were used by one or more members of the conspiracy in the firefight of

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[5] *Bailey* gives as examples of active employment "brandishing, displaying, bartering, striking with, and most obviously, firing or attempting to fire, a firearm." *Bailey v. United States*, 516 U.S. 137, 148, 116 S. Ct. 501, 508, 133 L. Ed. 2d 472, ___ (1995).

February 28[, 1993]. The jury was not required to do so and the district court only entered those findings then required. With *Bailey*, the district court must take another look and enter its findings regarding "active employment." Should the district court find on remand that members of the conspiracy actively employed machine-guns, it is free to reimpose the 30-year sentence. We vacate the defendants' sentences on [the count of the indictment that charges a violation of § 924(c)(1)] . . . and remand for re-sentencing on that count.

We note that, on remand, the district court should consider whether the defendants actively employed a weapon during and in relation to the conspiracy to murder federal agents.

Id. at 740-41. In accordance with these comments, we entered a mandate that stated, in part: "[The sentences for the § 924(c)(1) convictions] are vacated and remanded for findings and re-sentencing."

On remand, the district court found that one or more persons involved in the conspiracy to murder federal agents had actively employed machine guns and other enhancing weapons in the firefight on February 28, 1993, and then applied the *Pinkerton* doctrine to attribute the active employment of machine guns and other enhancing weapons to the defendants on February 28, 1993. Alternatively, it found that Branch and Avraam each had used (*i.e.*, actively employed) and carried a machine gun on February 28, 1993, and that Castillo and Craddock each had carried a hand grenade on April 19, 1993. The district court re-sentenced

Castillo, Branch, Avraam, and Whitecliff to thirty years imprisonment and Craddock to ten years imprisonment.[6] The defendants timely appealed.

II

This appeal involves the following contentions: (1) we erred in holding that, in the context of § 924(c)(1), the type of firearm used or carried during and in relation to a crime of violence or a drug trafficking crime is a sentencing enhancement, and not an element of the offense; (2) we erred in holding that a conviction for violating § 924(c)(1) stands despite the absence of a conviction for the predicate offense; (3) the district court's jury instruction on the "use" of a firearm was improper; (4) the district court's application of the *Pinkerton* doctrine was improper; (5) the district court clearly erred in finding that Branch and Avraam each had used and carried a machine gun on February 28, 1993; (6) the district court clearly erred in finding that Castillo and Craddock each had carried a hand grenade on April 19,1993; (7) the district court clearly erred in considering conduct other than that which occurred on February 28, 1993, in re-sentencing Castillo and Craddock; and (8) the district court applied the wrong standard of proof in sentencing the defendants.[7] The Government asserts that either the law-of-

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[6] Having again found Craddock subject to a thirty-year sentence pursuant to § 924(c)(1), the district court left undisturbed its previous decision to adjust Craddock's sentence downward to ten years.

[7] For the sake of brevity, our subsequent discussion will attribute each argument to all of the defendants, regardless of whether or not all of the defendants actually have advanced it.

the-case doctrine or the waiver doctrine precludes the first, second, third, fourth, and eighth contentions.

The law-of-the-case doctrine "posits that when a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case." *Arizona v. California*, 460 U.S. 605, 618, 103 S. Ct. 1382, 1391, 75 L. Ed. 2d 318, ___ (1983). Based on this general principle, we have developed specific rules about how our earlier decisions affect later proceedings and cases. *See Crocker v. Piedmont Aviation, Inc.*, 49 F.3d 735, 739 (D.C. Cir. 1995).

The law-of-the-case doctrine follows from the "sound policy that when an issue is once litigated and decided, that should be the end of the matter." *United States v. United States Smelting Ref. & Mining Co.*, 339 U.S. 186, 198, 70 S. Ct. 537, 544, 94 L. Ed. 750, ___ (1950). It is an exercise of judicial discretion, not a limit on judicial power. *See Messinger v. Anderson*, 225 U.S. 436, 444, 32 S. Ct. 739, 740, 56 L. Ed. 1152, ___ (1912).

The waiver doctrine bars consideration of an issue that a party could have raised in an earlier appeal in the case. *See Brooks v. United States*, 757 F.2d 734, 739 (5th Cir. 1985). It "serves judicial economy by forcing parties to raise issues whose resolution might spare the court and parties later rounds of remands and appeals." *Hartman v. Duffey*, 88 F.3d 1232, 1236 (D.C. Cir. 1996), *cert. denied*, 520 U.S. 1240, 117 S. Ct. 1844, 137 L. Ed. 2d 1048 (1997). The waiver doctrine differs from the law-of-the-case doctrine in that it arises as a consequence of a party's inaction, not as a

consequence of a decision on our part. *See Crocker*, 49 F.3d at 739.

Only plain error justifies departure from the waiver doctrine. *See id.* at 740; *cf. McCann v. Texas City Ref., Inc.*, 984 F.2d 667, 673 (5th Cir. 1993) ("It is the unwavering rule in this Circuit that issues raised for the first time on appeal are reviewed only for plain error."). We find plain error when (1) there is an error (2) that is clear and obvious and (3) that affects substantial rights. *See United States v. Olano*, 507 U.S. 725, 732, 734, 113 S. Ct. 1770, 1776, 1777, 123 L. Ed. 2d 508, ___ (1993). In most cases, the party asserting plain error bears the burden of making a specific showing of prejudice (*i.e.*, the error affected the outcome of the district court proceedings) to satisfy the affects substantial rights prong. *See id.* at 735, 113 S. Ct. at 1778, 123 L. Ed. 2d at ___. Even if we find plain error, we reverse only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings. *See id.* at 732, 113 S. Ct. at 1776, 123 L. Ed. 2d at ___.

We now consider the applicability of the law-of-the-case doctrine and the waiver doctrine to this appeal.

III

A

The defendants argue that, in the context of § 924(c)(1), the type of firearm used or carried during and in relation to a crime of violence or a drug trafficking crime is an element of the offense. In disposing of the defendants'

first appeal, we rejected this contention, and found that the type of firearm is a sentencing enhancement.[8] *See Branch*, 91 F.3d at 740.

The defendants' argument implicates the law-of-the-case rule that when we resolve a legal issue and remand to the district court, our decision binds subsequent proceedings in the district court and on later appeal. *See White v. Murtha*, 377 F.2d 428, 431-32 (5th Cir. 1967). The rule covers issues that we have decided explicitly and by necessary implication. *See Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16, 19 (5th Cir. 1974). It furthers judicial efficiency and discourages panel shopping at the circuit level. *See Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 662 (5th Cir. 1974). We depart from the rule only if (1) the evidence presented at trial following remand is substantially different, (2) a controlling authority has made a contrary decision of law since our earlier decision, or (3) our earlier decision was clearly erroneous and would work a manifest injustice. *See White*, 377 F.2d at 431-32. The party seeking a reversal of our earlier decision bears the burden of showing the applicability of one of these exceptions. *See Morrow v. Dillard*, 580 F.2d 1284, 1292 (5th Cir. 1978).

The defendants maintain that the law-of-the-case rule is inapplicable here because our prior finding that the type of firearm is a sentencing enhancement, and not an element of the offense, was dictum. We agree with the assumption

[8] The Government claims that Congress amended § 924(c)(1) after the defendants were convicted and sentenced to make clear that the type of firearm is a sentencing enhancement. *See* 18 U.S.C. § 924(c)(1).

underlying this assertion that the rule reaches earlier decisions but not earlier dictum.[9] *See Society of the Roman Catholic Churches of the Diocese of Lafayette, Inc. v. Interstate Fire & Cas. Co.*, 126 F.3d 727, 735 (5th Cir. 1997); *see also In re United States*, 60 F.3d 729, 731 (11th Cir. 1995) (per curiam). However, we disagree that our prior finding was dictum. As the Government says in its brief, our prior finding "was clearly necessary and essential to the decision to remand the case for further findings, for there would have been no need for further findings if the type of weapon was not a sentencing enhancement."

The defendants also attempt to persuade us to discard the law-of-the-case rule. However, they are unsuccessful. We reject the insinuation that our refusal to depart from the rule will result in manifest injustice because Supreme Court review is no longer available to the defendants as a result of the previous denial of their petition for a writ of certiorari on our prior decision. *See Forsyth v. Hammond*, 166 U.S. 506, 513, 17 S. Ct. 665, 668, 41 L. Ed. 1095, ___ (1897) (characterizing the discretion to grant or deny a petition for a writ of certiorari as "comprehensive and unlimited"). We also find unavailing the various arguments suggesting that our prior decision was clearly erroneous that is, was "dead wrong." *City Pub. Serv. Bd. v. General Elec. Co.*, 935 F.2d 78, 82 (5th Cir. 1991) (following *Parts & Electric Motors,*

[9] Dictum is "language unnecessary to a decision, [a] ruling on an issue not raised, or [the] opinion of a judge which does not embody the resolution or determination of the court, and [which is] made without argument or full consideration of the point." *Lawson v. United States*, 176 F.2d 49, 51 (D.C. Cir. 1949) (internal quotations omitted).

Inc. v. Sterling Electric, Inc., 866 F.2d 228, 233 (7th Cir. 1988)). While most of the arguments merit no discussion, we wish to respond to two of them. First, our prior decision need not be reversed because it conflicts with the holdings of several other circuits. *See In re Korean Air Lines Disaster of Sept. 1, 1983*, 829 F.2d 1171, 1183 n.22 (D.C. Cir. 1987) (D. H. Ginsburg, J., concurring) (discussing the law-of-the-case doctrine), *aff'd*, 490 U.S. 122, 109 S. Ct. 1676, 104 L. Ed. 2d 113 (1989). Second, our prior decision does not contravene *United States v. Almendarez-Torres*, 523 U.S. 224, 118 S. Ct. 1219, 140 L. Ed. 2d 350 (1998), and *Jones v. United States*, ___ U.S. ___, 119 S. Ct. 1215, ___ L. Ed. 2d ___ (1999), two intervening Supreme Court decisions. It accords with the directive in *Almendarez-Torres*, 523 U.S. at ___, 118 S. Ct. at 1223, 140 L. Ed. 2d at ___, to look at "language, structure, subject matter, context, and history" in determining whether or not Congress intended for a statute to define a separate crime or to set forth a separate sentencing factor. *See Branch*, 91 F.3d at 738-40 (examining § 924(c)(1)'s text, structure, and legislative history). Our prior decision also does not conflict with *Jones*. This case and *Jones* differ in a critical way. In *Jones*, the legislative history contained conflicting indications of whether Congress intended for 18 U.S.C. § 2119, the statute at issue, to lay out three distinct offenses or a single crime with three maximum penalties. *See Jones*, ___ U.S. at ___, 119 S. Ct. at 1221, ___ L. Ed. 2d at ___. In contrast, the legislative history of § 924(c)(1) discloses that Congress consistently referred to the machine gun clause as a penalty and never indicated that it intended to create a new, separate offense for machine guns. *See Branch*, 91 F.3d at 739. Accordingly, we decline to reconsider our prior decision that the type of firearm used or carried is a sentencing

enhancement, and not an element of the offense.

B

The defendants further assert that the doctrine of constitutional doubt[10] and the rule of lenity[11] require that the type of firearm be deemed an element of the offense. This contention implicates the waiver doctrine. The defendants did not raise the doctrine of constitutional doubt or the rule of lenity in their first appeal. Nor have they shown that our refusal to consider these issues now will affect their substantial rights. *See Olano*, 507 U.S. at 735, 113 S. Ct. at 1778, 123 L. Ed. 2d at ___. Accordingly, the defendants have waived their challenge to our prior decision.

IV

The defendants maintain that, in disposing of their first appeal, we were wrong to let their convictions for violating § 924(c)(1) stand in the face of their acquittals on the predicate crime of conspiracy to murder federal agents. We based our decision to leave the convictions intact on

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[10] The doctrine of constitutional doubt provides that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, [a court] . . . will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *New York v. United States*, 505 U.S. 144, 170, 112 S. Ct. 2408, 2425, 120 L. Ed. 2d 120, ___ (1992) (internal quotations omitted).

[11] The rule of lenity provides that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *United States v. Bass*, 404 U.S. 336, 347, 92 S. Ct. 515, 522, 30 L. Ed. 2d 488, ___ (1971) (internal quotations omitted).

several cases in which we had held that a conviction for the predicate offense is unnecessary to convict under § 924(c)(1). *See United States v. Ruiz*, 986 F.2d 905, 911 (5th Cir. 1993); *United States v. Munoz-Fabela*, 896 F.2d 908, 910-11 (5th Cir. 1990). The defendants argue that we should have ignored those cases and followed a more recent decision, *United States v. Lucien*, 61 F.3d 366, 377 (5th Cir. 1995). They claim that *Lucien* contradicts the cases on which we relied and supports their argument.[12]

Even if *Lucien* conflicts with the cases on which we relied and supports the defendants' argument, we are unmoved. The law-of-the-case doctrine's progeny includes the rule that we must follow the first-in-time decision when faced with conflicting panel decisions. *See In re Caddo Parish-Villas S., Ltd.*, No. 98-10380, 1999 WL 239395, at *5 (5th Cir. May 10, 1999); *United States v. Iwegbu*, 6 F.3d 272, 274 n.1 (5th Cir. 1993); 18 Charles Alan Wright et al., Federal Practice and Procedure § 4478 (2d ed. 1981). Therefore, we must adhere to our earliest decision on whether or not a conviction on the predicate offense must occur to convict under § 924(c)(1). Our earliest decision rejects the position that the defendants take on the issue.[13]

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[12] In denying the defendants' petition for rehearing in the first appeal, we held that "*Lucien* does not control this case." *Branch*, 91 F.3d at 752 (per curiam).

[13] The Supreme Court recently indicated agreement with our view that a finding of guilt on the predicate offense is unnecessary to convict under § 924(c)(1). In *United States v. Rodriguez-Moreno*, ___ U.S. ___, 119 S. Ct. 1239, ___ L. Ed. 2d ___, ___ (1999), it identified the following as the elements of a § 924(c)(1) offense: (1) using or carrying a firearm; (2) the commission of all acts necessary to be subject to punishment for a crime of violence or a drug trafficking offense; and (3) using or carrying a firearm during and in relation to a crime of violence or a drug trafficking offense. *See id.* at ___, 119 S. Ct. at 1243, ___ L. Ed. 2d at ___. The Court's rendition of the elements provided that a defendant must be found to have committed the elements of the predicate offense, not that he must have been found guilty of the predicate offense. As such, it resonated with our earlier holding that "it is only the fact of the offense, and not the conviction, that is need[ed] to establish the required predicate." *Branch*, 91 F.3d at 733 (internal quotations omitted).

See Munoz-Fabela, 896 F.2d at 910-11. Accordingly, we decline to reconsider our earlier holding that the absence of a finding of guilt on the predicate offense does not negate the defendants' convictions for violating § 924(c)(1).

V

The defendants assert that we should overturn their convictions for violating § 924(c)(1) because the district court's jury instruction on "use" failed to comport with *Bailey*. This argument implicates the waiver doctrine. The defendants could have raised their contention in their first appeal. Furthermore, they have not shown that district court's erroneous jury instruction affected their substantial rights and therefore amounted to plain error. *See Olano*, 507 U.S. at 735, 113 S. Ct. at 1778, 123 L. Ed. 2d at ___. In this regard, we previously have held that the evidence was sufficient to convict the defendants for using firearms in the sense contemplated by *Bailey*.[14] *See Branch*, 91 F.3d at 735.

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[14] Although the issue before us is whether or not the erroneous instruction on "use" was plain error, we find our approach toward erroneous jury instructions in the harmless error context instructive. *See United States v. Olano*, 507 U.S. 725, 734, 113 S. Ct. 1770, 1778, 123 L.

Accordingly, the defendants have waived their challenge to the district court's jury instruction on "use."

VI

The defendants criticize the district court for applying the Pinkerton doctrine for the purpose of determining the type of firearms that they had used. In our earlier decision, we stated:

> [T]here is evidence from which it could be found that machine-guns and other enhancing weapons [e.g., destructive devices, firearms equipped with silencers] were used by one or more members of the conspiracy in the firefight of February 28[, 1993]. . . . Should the district court find on remand that members of the conspiracy actively employed machine-guns, it is free to reimpose the 30-year sentence.

Id. at 740-41. The district court understood these comments to mean that on remand it was only to make findings on the active employment of machine guns, and that it was not to revisit the applicability of the *Pinkerton* doctrine.

The defendants' criticism implicates the mandate rule, a corollary of the law-of-the-case doctrine. *See United States*

Ed. 2d 508, ___ (1993) (explaining how harmless error analysis and plain error analysis are alike and different). When considering the matter of harmless error, we have stated that an erroneous jury instruction on an element of the offense is non-prejudicial beyond a reasonable doubt when, given the factual circumstances of the case, the jury could not have found the defendant guilty without making the proper factual finding as to that element. *See United States v. Saks*, 964 F.2d 1514, 1521 (5th Cir. 1992).

v. Becerra, 155 F.3d 740, 753 (5th Cir. 1998). The mandate rule requires a district court on remand to effect our mandate and to do nothing else. *See id.*

We hold that the district court's decision not to reconsider the applicability of the Pinkerton doctrine on remand was consistent with our mandate. Nor do we see any reason to depart from the mandate rule in this case. The defendants claim that the *Pinkerton* doctrine was unavailable to the district court because the jury did not convict them of the predicate offense to the § 924(c)(1) charge. This argument ignores our earlier holding that the absence of a guilty verdict on the predicate offense does not invalidate a conviction for violating § 924(c)(1). *See Branch*, 91 F.3d at 732-33. The defendants also argue that the *Pinkerton* doctrine plays no role in determining a sentence for a violation of § 924(c)(1) because § 1B1.3 of the Sentencing Guidelines, an analogue to the *Pinkerton* doctrine, is inapplicable to § 2K2.4, which covers § 924(c)(1). However, we have endorsed the use of the *Pinkerton* doctrine to determine the sentence of a co-conspirator under 21 U.S.C. § 841(b), a statutory provision analogous to § 924(c)(1).[15] *See United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995). For us to depart from the mandate rule, the defendants must show that

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[15] Section 841(b) sets out sentences for those defendants convicted for drug offenses under 21 U.S.C. § 841(a). *See* 21 U.S.C. § 841(b). Under it, sentences are based on the quantity of drugs involved in the offense. *See id.* In *United States v. Ruiz*, 43 F.3d 985, 992 (5th Cir. 1995), we held "that the standards for determining the quantity of drugs involved in a conspiracy for guideline sentencing purposes apply in determining whether to impose the statutory minimums prescribed in § 841(b)."

we previously were "dead wrong." *City Public Serv. Bd.*, 935 F.2d at 82. They have not done so. Accordingly, we decline to reconsider our prior approval of the district court's application of the *Pinkerton* doctrine.[16]

VII

Finally, the defendants claim that the district court erred in making findings of fact for purposes of sentencing based on the preponderance of the evidence. They assert that the district court was obliged to apply a higher evidentiary standard because the increase in their sentences from 5 to 30 years the consequence of the district court's findings of fact on active employment of machine guns was dramatic and devastating. In support of their argument, they point to the following observation that we made in *United States v. Mergerson*, 4 F.3d 337, 343 (5th Cir. 1993):

> We recognize a growing number of cases decided by courts in other circuits in which a higher standard of proof has been suggested or required when a finding of a particular fact relevant to sentencing dramatically alters the sentencing options of the court to the disadvantage of the defendant. We also recognize dicta in the Supreme Court's decision in *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct.2411, 91

[16] Because we do not reconsider our prior approval of the district court's application of the *Pinkerton* doctrine, we need not resolve the following contentions of the defendants: (1) the district court clearly erred in finding that Branch and Avraam each had used a machine gun on February 28, 1993; (2) the district court clearly erred in finding that Castillo and Craddock each had carried a hand grenade on April 19, 1993; and (3) the district court clearly erred in considering conduct other than that which occurred on February 28, 1993, in re-sentencing Castillo and Craddock.

> L. Ed. 2d 67 (1986), to the same extent.

The defendants' contention implicates the waiver doctrine. The district court initially imposed the defendants' sentences based on findings of fact made by a preponderance of the evidence. The defendants therefore could have attacked the correctness of the standard of proof in their first appeal. Moreover, the district court's error, if any, was not plain in light of several circumstances. See *Olano*, 507 U.S. at 734, 113 S. Ct. at 1777, 123 L. Ed. 2d at ___ ("'Plain' is synonymous with 'clear' or equivalently, 'obvious.'"). We have noted that "[i]t is well-established that the preponderance of evidence standard is the applicable standard for sentencing purposes," *United States v. Gaytan*, 74 F.3d 545, 558 (5th Cir. 1996), and have expressed "reluctan[ce] to part from the preponderance of evidence standard in a non-capital case," *United States v. Milsaps*, 157 F.3d 989, 995 (5th Cir. 1998). Additionally, another circuit court has held that an increase in a sentence comparable to the increase in the sentences in this case is an insufficient reason to necessitate resort to a higher standard of proof. *See United States v. Porter*, 23 F.3d 1274, 1277-78 (7th Cir. 1994) (citing an earlier case in which the sentence jumped from a Sentencing Guideline range of 33 to 41 months to consecutive 20-year terms). Accordingly, the defendants have waived their challenge to the standard of proof that the district court applied in sentencing them.

VIII

We agree with the Government that the law-of-the-case doctrine and the waiver doctrine determine the

disposition of this appeal. Accordingly, we affirm.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 97-50708

U.S. Court of Appeals
F I L E D
July 28, 1999
Charles R. Fulbruge III
Clerk

UNITED STATES OF AMERICA,

Plaintiff - Appellee

v.

JAIME CASTILLO; BRAD EUGENE BRANCH; RENOS LENNY AVRAAM; GRAEME LEONARD CRADDOCK; KEVIN A. WHITECLIFF

Defendants - Appellants

Appeals from the United States District Court for the
Western District of Texas, Waco

ON PETITIONS FOR REHEARING EN BANC

(Opinion 6/22/99, 5 Cir., ____, ____ F.3d _____)

Before EMILIO M. GARZA, DeMOSS, and PARKER, Circuit Judges.

PER CURIAM:

(X) Treating the Petitions for Rehearing En Banc as Petitions for Panel Rehearing, the Petitions for Panel Rehearing for Jaime Castillo, Brad Eugene Branch, Renos Lenny Avraam, Graeme Leonard Craddock and Kevin A. Whitecliff are DENIED. No member of the panel nor judge in regular active service of the court having requested that the court be polled on Rehearing En Banc (FED. R. APP. P. and 5TH CIR. R. 35) the Petitions for Rehearing En Banc for Jaime Castillo, Brad Eugene Branch, Renos Lenny Avraam, Graeme Leonard Craddock and Kevin A. Whitecliff are DENIED.

ENTERED FOR THE COURT:

/s/
United States Circuit Judge

IN THE UNITED STATES DISTRICT COURT

FILED

FOR THE WESTERN DISTRICT OF TEXAS
CLERK,

SEP 05, 1997
CLERK, U.S. DIST. COURT

WACO DIVISION BY /s/ DEPUTY

UNITED STATES OF AMERICA	§	
	§	
	§	
v.	§	
	§	**Criminal No.**
	§	**W-93-CR- 046**
	§	
BRAD EUGENE BRANCH (2)	§	
KEVIN WHITECLIFF (3)	§	
JAIME CASTILLO (5)	§	
GRAEME LEONARD CRADDOCK (10)	§	
RENOS LENNY AVRAAM (11)	§	

ORDER

Before the Court for resentencing as to Count Three only are Defendants Branch, Whitecliff, Castillo, Craddock and Avraam. The Defendants were convicted under Court Three of using and carrying a firearm in violation of 18 U.S.C. § 924(c). At the original sentencing hearing, the

Court found that each of these defendants ". . . either had actual or constructive possession of the numerous fully automatic weapons and hand grenades present in the compound before February 28, 1993, and throughout the 51-day siege."

At the time, the finding was adequate to justify the enhanced thirty-year sentences. The intervening case of *Bailey v. United States*, 116 S.Ct. 501 (1995) changed that. In *Bailey*, the court held that possession was not enough; to use a weapon requires that it be actively employed.

In its opinion, the Court of Appeals stated:

> As we have explained, there is evidence from which it could be found that machine guns and other enhancing weapons were used by one or more members of the conspiracy in the firelight of February 28. The jury was not required to do so and the district court entered only those findings then required. With *Bailey* the district court must take another look and enter its findings regarding "active employment." Should the district court find in remand that members of the conspiracy actively employed machine guns, it is free to reimpose the 30-year sentence. We vacate the defendants' sentences on Count 3 and remand for resentencing on that count.
>
> We note that, on remand, the district court should consider whether the defendants actively employed a weapon during and in relation to the

> conspiracy to murder federal agents.

As stated by the higher court, there was "evidence from which it could be found that machineguns and other enhancing weapons were used by one or more members of the conspiracy in the firefight of February 28." This Court agrees and so finds. There the inquiry could end.

The Court, however, will set forth the evidence from which the Court finds that Branch, Castillo, Craddock and Avraam both used and carried enhancing weapons during the conspiracy.

Defendant Branch bragged that he had personally shot an ATF agent. Unlike most of the other Davidians, Branch was wearing civilian clothes on February 28. Special Agent Larry Shiver testified that taking cover behind a vehicle in front of the compound, he saw a white man, dressed in civilian clothes, firing what appeared to be a fully automatic weapon from a second floor window. Davidian Hollingsworth testified she heard Branch firing a weapon from different rooms on the second floor. The preponderance of the evidence convinces that Branch was that man and that he used and carried an enhanced weapon.

At trial, Rogans, a cell-mate of Avraam, testified that Avraam told him that he had a fully automatic weapon during the gun battle. The Court accepts that testimony of Rogans as credible and finds from a preponderance of the evidence that Avraam also used and carried an enhancing weapon.

Defendant Castillo was found to have had a live grenade on his person when he escaped the compound on the day of the fire. Obviously he carried an enhancing weapon on that day.

Likewise, Craddock left a live grenade in the cinder block building where he had hidden after he escaped the compound. Additionally, he admitted to Texas Rangers that Koresh had given him a grenade on the morning of the fire. The preponderance of the evidence is that Craddock also carried an enhancing weapon.

The Defendants argue that the Court is limited to the events of February 28. To the contrary, the Court of Appeals stated:

> The conspiracy to murder federal agents did not end with the death of the four agents on February 28. Rather, there was evidence that beginning prior to February 28 and continuing for almost four months after the ATF raid, the defendants conspired to kill any federal agent who attempted to approach the compound.

There is no direct evidence that Whitecliff personally used or carried an enhancing weapon. There is, however, abundant evidence that many members of the conspiracy actively employed and carried fully automatic machine guns. More than one witness who were experts in firearms testified credibly that they heard fully automatic gun fire coming from the compound on February 28.

Again the appellate court's opinion at 91 F.3d 740-41 states:

> Should the district court find on remand that members of the conspiracy actively employed machine guns, it is free to reimpose the 30-year sentence.

The Court so finds. More than a preponderance of the evidence clearly demonstrates that many members of the conspiracy fired, brandished, displayed and carried fully automatic machine guns and hand grenades during the period of the conspiracy. As to Count Three, the 30-year sentences of Branch, Whitecliff, Castillo and Avraam will be reimposed. The 10-year sentence of Craddock will be reimposed. The other terms of the original sentences are not disturbed.

IT IS SO ORDERED.
SIGNED this 5 day of September, 1997.

/s/
WALTER S. SMITH, JR.
UNITED STATES DISTRICT JUDGE

CONSTITUTIONAL PROVISIONS AND STATUTES

U.S. Const., Amend. V, provides in part:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury . . . .

U.S. Const., Amend VI, provides in part:

In all criminal prosecutions, the accused shall enjoy a right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed; which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation . . . .

18 U.S.C. § 924(c)(1), (3), provided:

Whoever, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years, and if the firearm is a short-barreled rifle, short-barreled shotgun to imprisonment for ten years, and if the firearm is a

machinegun, or a destructive device, or is equipped with a firearm silencer or firearm muffler, to imprisonment for thirty years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for twenty years, and if the firearm is a machinegun, or a destructive device, or is equipped with a firearms silencer or firearm muffler, to life imprisonment without release. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the crime of violence or drug trafficking crime in which the firearm was used or carried. No person sentenced under this subsection shall be eligible for parole during the term of imprisonment imposed herein.

* * *

(3) For purposes of this subsection the term "crime of violence" means an offense that is a felony and--

(A) has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or

(B) that by its nature, involves a substantial risk that physical force against the person or

property of another may be used in the course of committing the offense.